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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

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UNITED FARMERS AGENTS ASSOCIATION, INC., *et al*,

Petitioners,

v.

FARMERS INSURANCE EXCHANGE, *et al.*,

Respondents.

◆

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

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43 pp

QUESTIONS PRESENTED

In a per se antitrust tying case, the lower courts granted the defendants summary judgment based upon a finding that defendants lacked sufficient market power in the relevant market as defined by the Fifth Circuit.

The Fifth Circuit defines relevant market by cross-elasticity of demand and defines market power by life-cycle pricing and switching cost analysis for the primary market only.

Does this Court's decision in *Eastman Kodak v. Image Technical Services Inc.*, 112 S.Ct. 2072 (1992) operate to remove a blind reliance upon antitrust economic theory such as that relied upon by the Fifth Circuit and does *Kodak* therefore redefine relevant markets and market power so as to allow plaintiffs to avoid summary judgment if they show genuine issues of material fact exist that there is a contractual tie affecting a not insubstantial amount of interstate commerce and defendants are shown to have market power or monopoly power in a non-primary relevant market?

Further presented for clarification is the question: can a lack of power in a primary market preclude review of evidence and, ultimately, preclude a determination of market power in derivative markets?

LIST OF ALL PARTIES

Petitioners:

UNITED FARMERS AGENTS ASSOCIATION, INC.;
THOMAS J. VINSON, on behalf of himself and all persons similarly situated;
ROBERT D. MOON, on behalf of himself and all persons similarly situated

Respondents:

FARMERS INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
FIRE INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
TRUCK INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
MID-CENTURY INSURANCE COMPANY; and
FARMERS NEW WORLD LIFE INSURANCE COMPANY

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 14

APPENDIX

Appendix A (Fifth Circuit Opinion) A-1

Appendix B (Rehearing Denied) A-12

Appendix C (Petition for Rehearing) A-13

TABLE OF AUTHORITIES

Page

Cases

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) 8

Eastman Kodak v. Image Technical Services, Inc., 504 U.S. 451, 112 S.Ct. 2072 (1992) 2, 4-13

Parratt v. Taylor, 451 U.S. 527, 532-34 (1981) 8

U.S. v. Loew's, 371 U.S. 38, 45 (1962) 7

United States v. Doe, 465 U.S. 605, 610 (1984) 8

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) 8

Eastman Kodak v. Image Technical Services, Inc., 504 U.S. 451, 112 S.Ct. 2072 (1992) 2, 4-13

Parratt v. Taylor, 451 U.S. 527, 532-34 (1981) 8

U.S. v. Loew's, 371 U.S. 38, 45 (1962) 7

United States v. Doe, 465 U.S. 605, 610 (1984) 8

Other Legal Publications

Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of* Kodak (Symposium on Post-Chicago Economics), 63 Antitrust L.J. 483 (1995). . . . . Fn. 3, p. 6

David F. Shores, *Law, Facts and Market Realities in Antitrust Cases After Brook and Kodak,* 48 SMU L. REV. 1835 (1995). . . . . Fn. 2, p. 5

Ronald S. Katz, *If Kodak is Just a 'Summary Judgment Case,' Then Why Are We Still Discussing It Two-and-One-Half Years Later?* (Anti/Intellectual Property Claims in High Technology Markets, Cosponsored by California Continuing Education of the Bar C137 ALI-ABA 61 (Jan. 26, 1995) . . . . . Fn. 2, p. 5

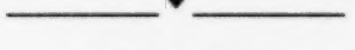
Ronald S. Katz, *If Kodak is Just a 'Summary Judgment Case,' Why Are We Still Discussing It Three Years Later?,* 12 No. 10 COMPUTER L. 11 (Oct. 1995) . . . . . Fn. 2, p. 5

PETITION FOR WRIT OF CERTIORARI

United Farmers Agents Association, Inc., Thomas J. Vinson, and Robert D. Moon ("UFAA, *et al*") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 25, 1996, in order to resolve the conflict between the Fifth Circuit and the Supreme Court of the United States on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published as *United Farmers Agents Association, Inc. v. Farmers Insurance Exchange*, 89 F.3d 233 (5th Cir. 1996). It is reprinted in a separate appendix, Appendix A ("App.A") at page A-1. By order issued September 26, 1996 (App. B at A-12), the Fifth Circuit denied the Appellants' Petition for Rehearing (App. C at A-13). The preceding decision of the United States District Court for the Western District of Texas is published at 892 F.Supp. 890.



JURISDICTION

On July 25, 1996, the United States Court of Appeals for the Fifth Circuit affirmed the United States District Court for the Western District of Texas's dismissal by Summary Judgment. On September 5, 1996, Appellants' Petition for Rehearing was denied *per curiam* by the Fifth Circuit. Pursuant to Court Rule 13.3, this petition has been filed within 90 days of

the denial of rehearing.

The rationale for the Fifth Circuit's decision is in direct and apparent conflict with this Court's decision in *Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S.Ct. 2072 (1992), and review should be considered in accordance with Court Rule 10(c).

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Sherman Anti-Trust Act, §1, as amended, 15 U.S.C. §1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The Clayton Act, §3, 15 U.S.C. § 14, provides in relevant part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . , or fix a price charged therefor...on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or

seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

STATEMENT OF THE CASE

United Farmers Agents Association (UFAA)[1] and Farmers insurance agents Thomas J. Vinson and Robert D. Moon, sued several entities of Farmers Insurance Group in a class action on behalf of all Farmers agents and alleged that Farmers engaged in an illegal tying arrangement where the tying product was on-line electronic access to the Farmers Agency Network System and the tied products were: 1) computers sold by Farmers to its agents, 2) peripherals sold by Farmers to its agents, and 3) service/maintenance agreements sold to the agents by Farmers and/or IBM. Plaintiffs further contended that the tying arrangement was a per se illegal contractual tie within the relevant market for electronic access by agents to Farmers' network. Prior to the completion of discovery, the district court certified the class for liability purposes under FED.R.CIV.P. 23(b)(1) but deferred a ruling on certification of a damages class pending the outcome on liability.

The district court granted Farmers Insurance summary judgment and dismissed the antitrust class action of the plaintiffs by adopting a magistrate's report. Plaintiffs appealed on grounds of procedural irregularity, abuse of discretion, and failure to use the proper standard of review for summary

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[1] A voluntary non-profit nationwide association counting among its membership over 2,500 current and former Farmers agents.

judgment cases involving illegal tying arrangements as set forth by this Court in *Eastman Kodak v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992). On appeal, the Fifth Circuit affirmed by defining the relevant market as the worldwide market for insurance sales, finding that Farmers lacked market power in the relevant market, and declining to make further inquiry into whether Farmers' policies constituted an illegal tie.

The Fifth Circuit defined the relevant market by cross-elasticity of demand between a given product and its substitutes. To determine cross-elasticity of demand, the Fifth Circuit sought to gauge the information and switching costs incurred by agents theoretically choosing to switch from selling Farmers insurance to selling the policies of another competing company. The Fifth Circuit sought to distinguish this case from *Kodak* by repeating the magistrate's assertion that plaintiffs failed to proffer evidence of above-market pricing or price discrimination. Appellants filed a Petition for Rehearing (App. C at A-13) to alert the court of 1) the voluminous summary judgment proof of above-market pricing and price discrimination as defined in *Kodak*; and 2) the fallacy of defining the relevant market as worldwide insurance sales while maintaining that Farmers agents are the only consumers for the purpose of determining information and switching costs. That Petition was denied. (A-12).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Directly Conflicts With This Court's Ruling in *Kodak* and Is Contrary to the Policies Set Forth Therein Regarding Criteria for Summary Judgment in Antitrust Tying Cases.

For many observers and legal scholars, this Court's

decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S.Ct. 2072 (1992) stands for a departure from the fifteen-year reign of the highly theoretical Chicago School of Economics over antitrust law in this country.[2] The "Chicago School" is a theoretical construct that, *inter alia,* does not recognize the existence of a company's anticompetitive power in secondary or derivative markets (aftermarkets, for example) unless that company also controls its primary product market. Another major tenet of Chicago School theory is that consumers have sufficient knowledge to make every important economic decision and are sophisticated enough to determine the life-cycle impact of deliberate attempts by companies to engage in installed-base opportunism or take advantage of actual or perceived monopolies.

This Court held in *Kodak* that, thenceforth, antitrust law would look to the facts on a case-by-case basis to determine the ultimate antitrust issues, eschewing presumption and reliance upon unsupported economic theories such as those propounded by the Chicago school. "Legal presumptions that rest on formalistic distinctions rather than market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis focusing on the particular facts disclosed by the record." *Id.* at 2082. This Court realized that market imperfections inevitably would lead to theoretical inconsistencies and attempted to allow the analysis of market imperfections such as high information and

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[2] Ronald S. Katz, *If Kodak is Just a 'Summary Judgment Case,' Why Are We Still Discussing It Three Years Later?*, 12 No. 10 COMPUTER L. 11 (Oct. 1995). Ronald S. Katz, *If Kodak is Just a 'Summary Judgment Case,' Then Why Are We Still Discussing It Two-and-One-Half Years Later?* (Anti/Intellectual Property Claims in High Technology Markets, Cosponsored by California Continuing Education of the Bar C137 ALI-ABA 61 (Jan. 26, 1995). David F. Shores, *Law, Facts and Market Realities in Antitrust Cases After Brook and Kodak*, 48 SMU L. REV. 1835 (1995).

switching costs into antitrust analysis without a wholesale rejection of economic theory. For example, the existence of significant information and switching costs, the Court observed, could create a less responsive connection between the demand for equipment and the price of parts than economic theory would suggest. *Id.* at 2085-6. As a result of this reliance upon a case-by-case factual analysis, *Kodak* has been put forward as the preeminent example of so-called "Post-Chicago Economics."[3]

The basic premise in antitrust tying law is that consumers are harmed by being forced to take a product they do not want, or one they would prefer to buy elsewhere. As a result, competing producers of tied products are harmed in that their products are rejected in favor of inferior products forced upon the consumer through the tie. The foregoing harm can occur only if the company attempting to require such a tie has sufficient market power to force a purchaser to do something she would not do in a competitive market. Regardless of whether economic theory exists to the contrary, the relevant statutes in this area clearly were written with an understanding that such arrangements were anticompetitive and those statutes were intended to make such tying arrangements illegal.

This Court rejected Kodak's argument that the relevant market analysis was dependent upon cross-elasticity of demand. While this Court recognized that this concept had generally been used by the courts to define the relevant product market, its analysis of the theory in respect to the facts in *Kodak* resulted in the conclusion that, "contrary to Kodak's assertion, there is no immutable physical law—no 'basic economic reality'—insisting that competition in the equipment market cannot

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[3] Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of* Kodak (Symposium on Post-Chicago Economics), 63 Antitrust L.J. 483 (1995).

coexist with market power in the aftermarkets." *Kodak*, at 2084. This is important because Kodak, like Farmers in the present case, sought summary judgment on the grounds that, without market power in their primary market, there could be no market power in the derivative market and, therefore, no illegal tie. Put another way, what the quoted section of *Kodak* means is that market power in primary markets is NOT a prerequisite to a determination of market power in derivative markets. Therefore, this Court decided that, even though Kodak lacked market power in the market for copiers (Kodak's primary market), summary judgment could not be granted on that ground alone since that lack of power in the primary market need not preclude, as a matter of law, the existence of market power in derivative markets. That issue being decided, the relevant market was defined in accordance with the effect of an alleged tying arrangement upon consumers and/or competitors. This Court defined it as the market for Kodak copiers and decided that whether Kodak had monopolistic market power within that relevant market was a triable claim.

The acceptance of a tie by consumers could thus be evidence of a seller's market power in and of itself according to *Kodak*'s reasoning, so long as consumers were buying tied products they would have preferred to purchase elsewhere. This was a return to antitrust inquiry in which presumptions based upon economic theory take a back seat to market reality; where " . . . it is fair to presume that the inability to buy the product elsewhere gives the seller market power." *U.S. v. Loew's,* 371 U.S. 38, 45 (1962).

Petitioners proffered evidence that Farmers' conduct increased prices and excluded a substantial competition in the tied market for computers, peripherals, and service/maintenance for agents seeking to achieve on-line access to Farmers' network. Those agents were defined by Petitioners as the

consumers in the relevant market.[4] Petitioners defined the relevant market to be the market for on-line information to Farmers' computer network, containing necessary policy, marketing, and rating information useful only to Farmers agents. Petitioners' evidence showed that lower price and equivalent or higher quality would be available in the tied product marketplaces but for Farmers' tying arrangement. Respondents failed to show any competitively relevant justifications and, according to *Kodak*, "when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment." *Kodak*, at 2088.

Petitioners have relied upon the above interpretation of the *Kodak* decision since the inception of this case, as have countless other plaintiffs seeking antitrust relief across the nation. To date, this Court has not granted any petitions for writ for the purpose of either enforcing or clarifying the *Kodak* decision with regards to summary judgment in antitrust tying cases. Certiorari is appropriate here either because of direct and apparent conflict—*United States v. Doe*, 465 U.S. 605, 610 (1984) ("to resolve the apparent conflict between the Court of Appeals holding and the reasoning underlying this Court's holding in [another case]")—or because it has been the subject of continuing controversy and confusion both in scholarly journals and the federal courts. *Cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Parratt v. Taylor*, 451 U.S. 527, 532-34 (1981).

In making its decision to affirm summary judgment, the Fifth Circuit chose to ignore the facts evidencing an illegal

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[4] The Fifth Circuit's choice of the buyers of insurance as consumer in the relevant market is questionable in light of the fact that Farmers only provided computers and computer access to agents, and never provided them to buyers of insurance.

tying scheme by Farmers—supplanting factual analysis with economic theory—and, in doing so ignored *Kodak*'s precedent as well as Appellants' voluminous evidence. It relied heavily upon the theories of Areeda and Turner in forcing cross-elasticity of demand into a scenario which clearly would not support such a theoretical construct. (A-4, fn. 3). The Fifth Circuit used sweeping generalizations, tending to conceal truth rather than reveal it. As a result, the Fifth Circuit refused to make inquiry into whether Farmers' policies constitute an illegal tie denied plaintiffs their rightful day in court. (A-3).

The Fifth Circuit's seminal error was in defining the relevant market as the worldwide insurance sales market (Farmers' primary market) without regard to the evidence presented by Petitioners of real-world market reality. That reality is as follows: Agents seeking to obtain on-line access to Farmers' computer network were contractually refused the opportunity to purchase that access without first purchasing a computer or computers from Farmers and promising to likewise purchase peripherals and service/maintenance from Farmers. This tying arrangement forced thousands of agents to pay an average of $7,500 more per computer than they would have paid for equivalent or superior equipment in the competitive marketplace.[5]

When responding to, and disagreeing with, Kodak's assertion that a single brand of a product or service can never be a relevant market under the Sherman Act, this Court stated,

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[5] No inferences were drawn in Petitioners' favor despite this Court's insistence that their evidence is to be believed and "all justifiable inferences are to be drawn in their favor." *Kodak*, at 2076.

> "The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners. * * * Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines."

Kodak, at 2090. Compared to the Fifth Circuit's decision, *Kodak* presents the better-reasoned approach. Using *Kodak*'s guideline, because the on-line access to information sought by agents is obtainable only through Farmers and that information is not interchangeable with other insurance carriers' information, the relevant market in this case is the market for access to Farmers' network just as the relevant market in *Kodak* was the Kodak copier market. (See Appellants' Petition for Rehearing at A-17-20 for a discussion of the logical inconsistencies of the Fifth Circuit's choice of worldwide insurance sales as the relevant market.)

Instead of correctly defining the relevant market based upon market reality, the Fifth Circuit chose to bend reality to force it into preconceived theoretical parameters. One example of this is the Fifth Circuit's analysis of information and switching costs. Rather than analyze these costs in relation to agents' decisions whether or not to obtain on-line access on Farmers' onerous terms, the Fifth Circuit chose to analyze them in relation to the agents' decisions to become Farmers agents *ab initio* or to switch to other insurance companies upon the initiation or notification of the tie. (Whether such lifecycle pricing actually occurs obviously raises a factual issue since the record contains no evidence that the required information was

available to the rank-and-file agents.)[6] Regardless of the inaccuracy of the Fifth Circuit's presumption that switching costs were negligible, its analysis was based upon a broader market than that required by *Kodak*. By defining the relevant market as broadly as it did, the Fifth Circuit rejected Petitioners' reliance upon *Kodak* and went so far as to dismiss Appellants' *Kodak*-based arguments as a failure to raise a question of material fact as to the relevant market.

The Fifth Circuit, in part, dismissed Petitioners' case because it decided that Farmers lacked the market power required to find an illegal tie. In *Kodak,* this Court defined that requirement to be "appreciable economic power in the tying product market" affecting "a substantial volume of commerce in the tied market." *Id.* at 2079. It cannot be denied that Farmers has total control over access to the information contained in its mainframe computer. Nor can it be denied that

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[6] If, on the one hand, such lifecycle pricing does not occur and agents are largely in the dark concerning the cost of switching to work for another insurance company or, on the other hand, if such lifecycle pricing does occur and agents realize that their switching cost is prohibitively high, the Fifth Circuit's theory fails because its presumptive contention that switching costs were inconsequential would not reflect market reality just as Kodak's theory failed for the same reason. Just like in *Kodak*, this particular market fails to perform according to economic theory, not because the theory is unsound, but because at least one premise (readily available information), upon which the theory is constructed, does not exist. Appellants made it clear in their Brief that 1) such information was intentionally and admittedly withheld by Farmers from its agents prior to the present lawsuit; 2) information as to Farmers' policies were obtained only through discovery in this case; and 3) that discovered information was further withheld from the agents by the operation of a protective order.

Nonetheless and furthermore, the Fifth Circuit acknowledged that more successful agents and agents who signed on with Farmers before the tying arrangement was initiated had higher switching costs than newer less successful agents. However, the Fifth Circuit refused to allow even those tied-in agents a chance to continue to trial.

Farmers has total control over the market for that access by agents. As to tying product volume, evidence was presented that the tying arrangement reduced sales by tens of millions of dollars in the interstate market for new and used computers capable of achieving access.[7] These facts were sufficient to survive summary judgment on market effect alone, without additional evidence presented of the monetary impact upon the peripheral and service/maintenance markets. Further proof of market power was evidence that agents would have obtained computers elsewhere, given that opportunity. This fits with this Court's definition of market power as the power "to force a purchaser to do something that he would not do in a competitive market." *Id.* at 2080. Clearly the Fifth Circuit erred in failing to apply this Court's directions in determining market power.

The Plaintiffs in *Kodak* presented sufficient proof that a reasonable trier of fact could find, first, that service and parts were two distinct products in light of evidence indicating that each had been sold separately, and second, that Kodak had tied the sale of the two products in light of evidence indicating that it would sell parts to third parties only if they agreed not to buy service from ISOs. *Id.* at 2079-80. This Court deemed that sufficient evidence of a tying arrangement to defeat a summary judgment motion. Despite Petitioners' proof and the Fifth Circuit's apparent acceptance that access and computers, peripherals, and service/maintenance are all separate products[8], despite proof of the existence of contractual ties where the agency network system contract required purchase or lease

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[7] These amounts are well in excess of the damages ultimately awarded by the jury in the *Kodak* case.

[8] Which were available separately subsequent to the inception of this lawsuit.

of computers from Farmers, and despite proof of the existence of computer purchase agreements which further required purchase of peripherals and service/maintenance from Farmers, the Fifth Circuit granted summary judgment for Farmers on the ground that no evidence existed of a tie in violation of antitrust laws.[9] This is an unacceptable refusal to accept the decision in *Kodak* as precedent.

The repercussions of the Fifth Court's decision upon antitrust tying cases is potentially enormous because it puts the meaning and, ultimately, a basic conclusion of this Court's decision in *Kodak* at doubt. It leaves unanswered for all antitrust plaintiffs the issue of whether a lack of power in a primary market can serve to prohibit review of evidence and, ultimately, allow defendants to avoid a determination of market power in derivative markets.

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[9] The Fifth Circuit even determined that Farmers never sold computers despite Farmers' admissions and contractual evidence to the contrary. (A-4). Other factual discrepancies abound. *See,* Appellants' Petition for Rehearing A-19-23.

CONCLUSION

For the foregoing reasons, it is apparent that the Fifth Circuit's decision in this case has been decided "in a way in conflict with applicable decisions of this Court" and, thus, the petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: December 4, 1996

APPENDIX A

89 F.3d 233
65 USLW 2101, 1996-2 Trade Cases P 71,500
(Cite as: 89 F.3d 233)

UNITED FARMERS AGENTS ASSOCIATION, INC.; Thomas J. Vinson; Robert D. Moon,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE EXCHANGE, a California Reciprocal or Inter-Insurance Exchange; Fire Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Truck Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Mid-Century Insurance Company; Farmers New World Life Insurance Company,

Defendants-Appellees.

No. 95-50559.

United States Court of Appeals,
Fifth Circuit.

July 25, 1996.

*234 Bogdan Rentea, Oren Lee Connaway, Rentea & Associates, Austin, TX, for plaintiffs-appellants.

James W. Cannon, Jr., Akin, Gump, Strauss, Hauer & Feld, Austin, TX, James E. *235 Coleman, Jr., Michael Thomas Braden, Lyndon F. Bittle, Carrington, Coleman, Sloman & Blumenthal, Dallas, TX, Nannette K. Beaird, Akin, Gump, Strauss, Hauer and Feld, Houston, TX, Don T. Hibner, Jr., Michelle Sherman, Sheppard, Mullin, Richter & Hampton, Los Angeles, CA, for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before GARWOOD, DAVIS and DeMOSS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge.

The United Farmers Agents Association (UFAA) and Farmers

insurance agents Thomas J. Vinson and Robert D. Moon appeal the district court's order granting Farmers Insurance summary judgment and dismissing their antitrust class action. We AFFIRM.

I.

Farmers Insurance is a group of five insurance companies with approximately 14,000 independent contractor agents in 29 states. Under the contract between Farmers and its agents, Farmers is obligated to provide policyholder information to the agents. It has always provided this information through manual records in paper and book form. In 1981, Farmers set up a computer system, the Farmers Agency Network System (FANS), to allow agents on-line access to this information in addition to the traditional manual access. Agents who wished to gain electronic access to policyholder information through FANS were required to purchase a specially configured IBM computer from Farmers or to use another agent's IBM computer purchased from Farmers.

The written agreement between Farmers and agents who purchased computers and gained access to FANS specifically stated that, absent written agreement from Farmers, only computers purchased through Farmers would be allowed to access FANS. Farmers' policy was to never grant a written waiver of this provision. This policy continued until 1993 when Farmers began allowing agents to use personal computers and computers purchased from third-party vendors to access FANS.

UFAA, Vinson and Moon (plaintiffs) filed this action as an antitrust class action on behalf of all Farmers agents alleging that Farmers illegally tied electronic access to policy information to the purchase of computers from Farmers. The district court certified the class for liability purposes under Federal Rule of Civil Procedure 23(b)(1) but deferred a ruling on certification of a damages class pending the outcome on liability. The district court referred discovery motions and other dispositive and non-dispositive motions to a magistrate judge who recommended that the district court grant summary judgment in favor of Farmers. On April 19, 1995, the district court adopted the magistrate's Report and Recommendation in full and dismissed the plaintiffs' suit. On appeal, plaintiffs argue that

the district court erred by granting Farmers' motion for summary judgment. [FN1]

FN1. Plaintiffs also assert that the district court erred by failing to review the summary judgment record de novo before adopting the magistrate judge's recommendation, using an improper standard in deciding whether summary judgment was appropriate and failing to certify plaintiffs as a damages class under Federal Rule of Civil Procedure 23(b)(3). Our de novo review of the record and use of the proper standard for granting summary judgment cure the first two of these asserted errors. Our affirmance of the district court's decision to grant summary judgment makes it unnecessary for us to consider the third.

II.

A.

Plaintiffs argue that Farmers' policies regarding electronic access to FANS constitute a per se illegal tying arrangement [FN2] and allege that the relevant *236 market [FN3] in which Farmers is illegally exercising market power is the market for electronic access to Farmers policy information. Farmers responds by arguing that the relevant market should be insurance sales and, even if the court accepts the plaintiffs' argument that a separate market exists for electronic access to Farmers policy information, Farmers has no power in the market for electronic access to Farmers policy information because of intense competition in the insurance sales market. We find that Farmers has no market power in the relevant market (insurance sales) and no market power even in the plaintiffs' alleged relevant market (electronic access to policy information). Market power is a necessary prerequisite to an illegal tie so we need not make any further inquiry into whether Farmers' policies constitute an illegal tie.

FN2. Tying exists when "a seller refuses to sell one product, which a buyer desires, unless the buyer also agrees to purchase a second product, which is not otherwise desired from this seller on the offered terms.... The desired product is called the 'tying' product; the other is the 'tied' product." 9 Phillip E. Areeda, *Antitrust Law* ¶ 1700a (1991). See also *Eastman Kodak Co. v. Image Technical*

Services, 504 U.S. 451, 461-62, 112 S.Ct. 2072, 2079-80, 119 L.Ed.2d 265 (1992). A tying arrangement is per se illegal when it has the following characteristics: (1) Two separate products (as opposed to components of a single product); (2) The two products are tied together or customers are coerced; (3) The supplier possesses substantial economic power over the tying product; (4) The tie has an anticompetitive effect on the tied market; and (5) The tie affects a not insubstantial volume of commerce. 9 Areeda, *Antitrust Law* ¶ 1702. See also *Kodak*, 504 U.S. at 461-62, 112 S.Ct. at 2079-80; *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11-28, 104 S.Ct. 1551, 1558-66, 80 L.Ed.2d 2 (1984). Tying arrangements and other restraints of trade that do not fit the criteria for per se illegality are evaluated under the Rule of Reason. *Jefferson Parish Hosp. Dist.*, 466 U.S. at 29, 104 S.Ct. at 1567. Under the Rule of Reason, the plaintiff has the burden of proving that the tying arrangement "unreasonably restrained competition." *Id.* This burden requires an inquiry into the actual effect of the tying arrangement on competition in the tied market. *Id.*

FN3. The relevant market in an antitrust inquiry is defined by the cross- elasticity of demand between a given product and its substitutes. 2 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 519a (1991). The cross-elasticity of demand for substitutes measures consumers' propensity to switch from one product to another, similar product when relative prices change. See William J. Baumol & Alan S. Blinder, *Economics: Principles and Policy* at 343 (1979). Products similar enough that a small relative price change causes consumers to substitute one for another are in the same market. 2 Areeda & Turner, *Antitrust Law* ¶ 525a.

Under the undisputed facts of this case, we agree with Farmers that the relevant market is the market for insurance sales. The only product that Farmers markets to consumers is insurance. We agree with the magistrate that the summary judgment record is "replete with evidence that Farmers Insurance sells insurance, not electronic access, not computers." (emphasis in original). Plaintiffs' alleged market consists of a single brand (Farmers) and a tying product (electronic access to policy information) that has never been available to anyone other than Farmers agents. The information that

the alleged tying product allows agents to access has always been available to agents in book form for free. Additionally, plaintiffs' own attorney could offer no justification at oral argument for choosing electronic access to Farmers policy information as the relevant market other than that he was trying to define the market as narrowly as possible (in order to make it look as if Farmers had market power). Plaintiffs have not alleged that Farmers has a superior or unique insurance product that allows it to charge consumers more for policies or pay agents less for selling them, and they have shown no evidence that new Farmers agents would face significant information or switching costs [FN4] in deciding whether to sell Farmers insurance or the insurance of another company. The agents have failed to give us any reason to view the market for electronic access to Farmers policy information as the relevant market.

FN4. Information costs in this case are the costs incurred by new agents in finding out how much Farmers will charge for electronic access to policy information and other services after they begin selling Farmers policies. Switching costs are the costs incurred in switching from selling Farmers insurance to selling the policies of another company. Compare *Kodak*, 504 U.S. at 473-77, 112 S.Ct. at 2083-88.

This suit is essentially an intracompany dispute over how to run a computer system, not a valid claim under antitrust laws. Economic power derived from contractual agreements such as franchises or in this case, the agents' contract with Farmers, "has nothing *237 to do with market power, ultimate consumers' welfare, or antitrust." Benjamin Klein & Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.LAW & ECON. 345, 356 (1985). We agree with the magistrate judge and the district court that plaintiffs fail to raise a question of material fact as to whether electronic access to Farmers policy information is the relevant market for our inquiry.

The relevant market for an inquiry into market power in this case is the market for insurance sales, and the agents do not contend that Farmers could exercise (or has exercised) market power in that market. The agents' claim is not, therefore, cognizable under

antitrust laws, and the magistrate judge and the district court correctly determined that Farmers was entitled to summary judgment.

B.

Even if we accept the plaintiffs' alleged market for electronic access to policy information as the relevant market, the plaintiffs have failed to prove that Farmers had or exercised market power. Farmers has 100% of the market share in the tying product (electronic access to policy information). However, this does not mean that Farmers has market power in the tying market. In fact, undisputed evidence showing that the markets for insurance sales and agents are highly competitive makes plaintiffs' argument that Farmers has market power in the market for its policy holder information highly unlikely in the absence of prohibitive information costs or the ability to price discriminate [FN5] between agents with high switching costs and those with low or no switching costs. See *Kodak*, 504 U.S. at 475, 112 S.Ct. at 2086-87. Plaintiffs have cited no evidence that information or switching costs were high for most agents and offer no evidence that Farmers attempted to engage in price discrimination.

FN5. Price discrimination is charging different buyers different prices for the same item. A price-discriminating monopolist charges each consumer as much as the consumer is willing to pay for an item. Consumers who desperately need a particular product are charged a high price for it while those who do not really need the product and will refuse to buy it rather than pay a high price are charged a relatively low price. A price- discriminating monopolist makes as much money as possible on its product because it charges high prices to the people who are willing to pay high prices without losing sales to people willing to pay only a low price. See 2 Areeda & Turner, *Antitrust Law* ¶ 514a.

The plaintiffs argue that *Kodak* compels us to deny Farmers' motion for summary judgment. However, their reliance on *Kodak* is misplaced. The Supreme Court's decision in *Kodak* was a rejection of Kodak's assertion that market power could never exist over repair parts in any case where the defendant did not have market power over the earlier-purchased machines needing those parts. Critically, the plaintiffs in *Kodak* produced evidence that Kodak was charging above

market prices for its service and was engaging in price discrimination in favor of the knowledgeable customers who could most easily obtain information or switch companies. *Kodak*, 504 U.S. at 465, 476, 112 S.Ct. at 2081, 2087. By contrast, the plaintiffs in this case have failed to proffer any specific evidence that the computers sold by Farmers were sold at above-market prices or that other equipment of comparable quality was available for less. The only summary judgment evidence plaintiffs submitted was general testimony that third-party vendors of used IBM system 36 computers were selling them for less than Farmers and in larger quantities. They offer no evidence regarding price, quality, reliability or the expense necessary to configure these computers to FANS. Except for general disclaimers, plaintiffs offered no assurance that these used computers would maintain the security of Farmers' policy information and would not introduce viruses into the system. Additionally, plaintiffs offer no evidence of an appropriate market price for electronic access to policy information and have failed to even allege that the tied bundle of electronic access and computers cost more than the sum of their market prices. See *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 673 (7th Cir.1985) ("[U]nless the plaintiff shows that the package price was elevated the suit *238 must be dismissed without further ado"), cert. denied, 475 U.S. 1129, 106 S.Ct. 1659, 90 L.Ed.2d 201 (1986); *Kypta v. McDonald's Corp.*, 671 F.2d 1282 (11th Cir.) (same), cert. denied, 459 U.S. 857, 103 S.Ct. 127, 74 L.Ed.2d 109 (1982). In sharp contrast to *Kodak*, in which the plaintiffs supported their claims of market power with evidence that Kodak charged above-market prices and engaged in price discrimination, the plaintiffs here simply allege that Farmers charged prices above the market price for computers without offering any evidence of what the market price for reliable computers was or alleging that the bundle of products, taken together, was sold at an above-market price.

The plaintiffs have failed to raise a question of material fact as to whether Farmers has sufficient market power in the market for electronic access to Farmers policy information to force agents to buy computers at higher than market prices. The fact that Farmers required agents to purchase a computer from it in order to obtain electronic access to policy information does not prove that Farmers

had market power. See *Breaux Bros. Farms, Inc. v. Teche Sugar* Co., 21 F.3d 83, 86-87 (5th Cir.), cert. denied, — U.S. —, 115 S.Ct. 425, 130 L.Ed.2d 339 (1994). As noted above, the summary judgment record contains no evidence that the computers were sold at a premium price or that acceptable alternatives were available for less. It also contains no evidence of what electronic access to policy information should cost. In fact, the summary judgment record strongly supports Farmers' argument that it had no power in the electronic-access-to-policy-information market.

Plaintiffs do not dispute that the insurance sales market is highly competitive. Absent high information or switching costs, intense competition in the market for insurance agents will force Farmers to pay competitive wages and preclude it from imposing above-market prices on its agents for the services it provides them. Additionally, availability of manual access to policy information was a good substitute for electronic access. This seriously limited Farmers' ability to charge more than the market price for electronic access to the same information. [FN6] The summary judgment record here contains no evidence that information or switching costs were high enough to produce any substantial market power for Farmers and no evidence that manual access to policy information was so seriously inadequate as a substitute for electronic access as to allow Farmers to exercise market power over electronic access.

FN6. Substitutes limit market power by giving consumers an alternative to paying an above-market price for a product. The existence of a good substitute at a competitive price (in this case manual access to policy information for free) prevents a producer from selling its product at an above-market price. An attempt to raise price of the product above a competitive level will be met with a shift in demand from the product to its substitute. See 2 Areeda & Turner, *Antitrust Law* ¶ 525a.

Information and switching costs for Farmers agents hired after 1981 when FANS was implemented were virtually nonexistent. The summary judgment record shows that Farmers openly required agents wishing to access FANS to do so only with computers purchased from Farmers. Any agent hired would have known of the two ways

to obtain policy information and could have easily inquired about the cost of electronic access. The computer installment contract clearly states that no non-Farmers computer will be allowed to access FANS without the written consent of Farmers. Division manager Bob Akers testified that he regularly told his agents that Farmers' policy was to not allow any computers purchased from third-party vendors to access FANS. Internal correspondence shows that a corporate officer who led an agent to believe that he could hook up his computer to FANS even though it was purchased from a third party was quickly reprimanded and informed that Farmers' policy was to not allow FANS access to any computers purchased from third parties. The plaintiffs produce no evidence that suggests that this information was difficult to obtain. Agents would clearly have become aware of Farmers' policy long before they faced significant switching costs.

If an agent, unhappy with Farmers' computer policy, wished to move to a new company, *239 he was free to do so. Switching costs for most agents were very low. The only switching cost evident in the summary judgment record is the inability to continue earning commission from Farmers policies which agents have already sold. New agents have virtually no switching costs because they have sold no policies or only a few. These agents can switch to selling insurance for another insurance company without incurring any significant cost. The only group of agents that faced switching costs of any significance were Farmers agents hired before 1981 when FANS was implemented. Switching costs for these agents could have been high because the agents could not take their customers with them if they left. Policyholders are Farmers' customers under the terms of the agency agreement and departing agents would be forced to give up the income from the numerous policies they had sold in previous years. [FN7]

FN7. It is important to note that even agents who faced high switching costs in the decision to switch insurance companies could easily have continued selling policies with the manual system. Farmers clearly did not require agents to use FANS and continued to supply its agents with manual policy information for free. Even, if manual access to policy information was inferior to electronic access, it was a reasonably good substitute that would have seriously limited Farmers' ability to charge above-market prices for electronic access

and computers even to those agents with many policies in force.

The absence of significant information costs to the agents and the existence of switching costs for some agents but not for others means that in order for Farmers to have exercised market power in the markets for electronic access and computers, it must have engaged in price discrimination. Farmers could exercise market power and sell electronic access or computers at above- market prices only to those agents with high switching costs. Agents with low switching costs would refuse to pay an above-market price for the bundled electronic access and computers. Rather than pay a premium, these agents could simply leave Farmers and move to another insurance company.

Plaintiffs submit no evidence that Farmers charged agents with many policies in force more than it charged new agents or those with few policies in force. They do not even allege that Farmers attempted to engage in price discrimination. Without an allegation that price discrimination occurred or evidence that Farmers agents faced prohibitive costs in discovering Farmers' computer policy, the plaintiffs cannot seriously argue that Farmers had or exploited any market power. Plaintiffs fail to raise a question of material fact as to whether Farmers had market power in the market for electronic access to policy information.

Conclusion

We agree with the district court and the magistrate judge that electronic access to policy information is merely a component of Farmers' insurance product and that the relevant market for an antitrust inquiry is the insurance sales market. Farmers exercised no market power in this highly competitive market, and plaintiffs' antitrust action fails for this reason alone. Additionally, even if we accept plaintiffs' alleged markets as the relevant markets for our inquiry, plaintiffs still fail to raise a question of material fact on the issue of whether Farmers has market power. Plaintiffs fail to offer any evidence of above-market computer prices or high switching or information costs. They present no evidence that Farmers engaged in price discrimination, and they offer no plausible economic

argument that would support market power. For all of these reasons, we find that plaintiffs have failed to raise a question of material fact as to whether Farmers violated antitrust laws. The judgment of the district court is, therefore, AFFIRMED.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50559

D.C. Docket No. A-92-CV-373

UNITED FARMERS AGENTS ASSOCIATION, INC.; Thomas J. Vinson; Robert D. Moon,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE EXCHANGE, a California Reciprocal or Inter-Insurance Exchange; Fire Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Truck Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Mid-Century Insurance Company; Farmers New World Life Insurance Company,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas, Austin

Before GARWOOD, DAVIS, and DeMOSS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the district court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: September 26, 1996

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 95-50559

UNITED FARMERS AGENTS ASSOCIATION, INC.,
THOMAS J. VINSON, on behalf of himself and all persons similarly situated, and
ROBERT D. MOON, on behalf of himself and all persons similarly situated,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
FIRE INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
TRUCK INSURANCE EXCHANGE, a California reciprocal or inter-insurance exchange;
MID-CENTURY INSURANCE COMPANY; and FARMERS NEW WORLD
LIFE INSURANCE COMPANY,

Defendants-Appellees

Appeal from a decision of the United States District Court for the Western District of Texas in Civil Action No. 92 CA 373 (consolidated with No. 92 CA 374) rendered on April 19, 1995 as entered on June 7, 1995 and amended on June 19, 1995 by Judge Lucius D. Bunton, III

APPELLANTS' PETITION FOR REHEARING

TABLE OF CONTENTS

POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL OF THE COURT A-17

I. The Court cannot, as a matter of law, define the relevant market for the purpose of this antitrust inquiry to be the worldwide market for insurance sales while maintaining that Farmers agents are the only consumers for the purpose of determining information and switching costs A-17

II. Since the Court defines Farmers agents to be the consumers in the relevant tying market, the relevant market must be confined to the market for electronic access to Farmers policy information A-17

III. Sufficient summary judgment evidence exists to demonstrate that computers sold by Farmers to its agents were sold at a premium over acceptable alternative A-17

IV. Sufficient summary judgment evidence exists to demonstrate the existence of price discrimination between certain classes of agents A-17

V. Since Farmers undeniably has monopolistic control over the tying product and has succeeded in overcharging its agents for tied products, and since proof exists of price discrimination, sufficient summary judgment proof exists to demonstrate market power and antitrust violation A-17

ARGUMENT A-17

I. The Court cannot, as a matter of law, define the relevant market for the purpose of this antitrust inquiry to be the worldwide market for insurance sales while maintaining that Farmers agents are the

only consumers for the purpose of determining information and switching costs A-17

II. Since the Court defines Farmers agents to be the consumers in the relevant tying market, the relevant market must be confined to the market for electronic access to Farmers policy information A-18

III. Sufficient summary judgment evidence exists to demonstrate that computers sold by Farmers to its agents were sold at a premium over acceptable alternatives A-20

IV. Sufficient summary judgment evidence exists to demonstrate the existence of price discrimination between certain classes of agents A-22

V. Since Farmers undeniably has monopolistic control over the tying product and has succeeded in overcharging its agents for tied products, and since proof exists of price discrimination, sufficient summary judgment proof exists to demonstrate market power and antitrust violation A-23

REQUEST FOR ANSWER A-24

TABLE OF AUTHORITIES

Cases

Eastman Kodak Co. v. Image Technical Services, Inc.,
504 U.S. 451, 112 S.Ct. 2072 (1992) A-18, 19, 21, 22, 23

POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL OF THE COURT

I. The Court cannot, as a matter of law, define the relevant market for the purpose of this antitrust inquiry to be the worldwide market for insurance sales while maintaining that Farmers agents are the only consumers for the purpose of determining information and switching costs.

II. Since the Court defines Farmers agents to be the consumers in the relevant tying market, the relevant market must be confined to the market for electronic access to Farmers policy information.

III. Sufficient summary judgment evidence exists to demonstrate that computers sold by Farmers to its agents were sold at a premium over acceptable alternatives.

IV. Sufficient summary judgment evidence exists to demonstrate the existence of price discrimination between certain classes of agents.

V. Since Farmers undeniably has monopolistic control over the tying product and has succeeded in overcharging its agents for tied products, and since proof exists of price discrimination, sufficient summary judgment proof exists to demonstrate market power and antitrust violation.

ARGUMENT

I. The Court cannot, as a matter of law, define the relevant market for the purpose of this antitrust inquiry to be the worldwide market for insurance sales while maintaining that Farmers agents are the only consumers for the purpose of determining information and switching costs.

We would respectfully submit that the Fifth Circuit's Opinion, as rendered on July 25, 1996, contains an inconsistency— the Opinion broadly defines the relevant market to encompass the market for insurance sales in its entirety[1] while, at the same time, it limits its consumer analysis to the population of Farmers agents. If the issues of this case were relevant to the worldwide insurance sales market, the consumers being faced with such issues as cross-elasticity of demand, information cost, switching cost, and life-cycle cost would be those seeking to purchase insurance worldwide.

A relevant product market must include products, buyers, and sellers. [See Affidavit of Jonathan L. Walker, R2829 AE 114 at 13]. This case concerns only the decisions of Farmers agents (buyers) regarding the purchase of computer systems, peripherals, and service (tied products) sold by Farmers (sellers) as a prerequisite to the agents' obtaining electronic access (tying product) to necessary rating and policy information available only through Farmers' mainframe. Once the buyers, sellers and products have been defined, the relevant market cannot be so globally redefined as to include irrelevant products and consumers who have no involvement with the transactions at issue.

The Court should be reminded that this is a Summary Judgment case and evidence is limited to summary judgment proof such as affidavits which must be presumed to be correct. In his affidavit, Plaintiffs' expert defined the relevant tying market to be electronic access to Farmers' mainframe and supported that definition with a litany of facts sufficient to survive summary judgment scrutiny. His affidavit has not been legally controverted. His conclusions are further supported by the relevant market definition in Judge Nowlin's Order and the consumer analysis in this Court's Opinion.

II. Since the Court defines Farmers agents to be the consumers in the relevant tying market, the relevant market must be confined to the market for electronic

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[1] The Court's Opinion does not even limit that market to domestic insurance sales.

access to Farmers policy information.

In its analysis of the relevant market, this Court concerns itself with such matters as information costs, switching costs, and life-cycle costs. It defines information costs as "the costs incurred *by new agents* in finding out how much Farmers will charge for electronic access to policy information and other services after they begin selling Farmers policies." [O. at 4581, fn. 4 (emphasis added)]. The Court should take into consideration the evidence presented by Plaintiffs that, in order for agents to obtain the truth about Farmers' intentionally concealed computer policy, it was necessary for agents to undertake the expense and personal risk of suing Farmers in federal court. Until discovery was conducted on this case, agents were unaware that they were being falsely advised that they could access the System via third party computers. [R2826B at 8, AE 33]. Nor were they aware that there was discord between management concerning this intentional misleading of agents. [R2826B at 8, AE 34]. Since the evidence remains protected, rank and file agents to this day are not privy to this information. The Court should ask Plaintiff, Tom Vinson, what the information cost was—it cost him his career to discover Farmers' true policy—before stating that agents' information costs were "virtually nonexistent."

Of particular note is the fact that the Court does not concern itself with the information costs to the purchasers of insurance worldwide. Likewise, the Court further defines switching costs as "the costs incurred in switching from *selling* Farmers insurance to *selling* the policies of another company. [O. at 4581, fn 4 (emphasis added)]. It does not concern itself with switching costs for those buying insurance, just the agents who are selling it. The ultimate consumer in the highly competitive insurance sales market is irrelevant to this Court's analysis of these antitrust issues, and rightfully so, because the insurance buyers are not the decision makers in the real relevant market for electronic access—the agents are.

The Court's Opinion refers the reader to *Kodak* for comparison on these issues. [*Id.*] A review of the section of *Kodak* cited reveals the Supreme Court's emphasis upon buyer-related issues.

"[I]nformation is likely to be customer-specific: lifecycle costs will vary from customer to customer." *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 474 (1992). "As an initial matter, if the number of sophisticated customers is relatively small, the amount of profits to be gained by supracompetitive pricing in the [tied] market could make it profitable to let the knowledgeable consumers to take their business elsewhere." *Id.* at 475, 2086. In *Kodak* it was purchasers of Kodak parts who were being forced to buy service against their will in order to get the parts and it remained to be determined how sophisticated the buyers were when the Supreme Court sent the case back for trial; in *Farmers* it is purchasers of electronic access who were forced to buy computers, peripherals, and service against their will in order to get access and, likewise, the sophistication of the agents remains a material fact issue.

With all due respect, this Court undertook the correct analysis for the wrong relevant market and then overlooked the Plaintiffs' supporting evidence.

III. Sufficient summary judgment evidence exists to demonstrate that computers sold by Farmers to its agents were sold at a premium over acceptable alternatives.

On pages 4582 and 4583 of its Opinion, this Court states that Plaintiffs proffered no evidence that computers sold by Farmers to agents were at above-market prices or that other equipment of comparable quality was available for less. This is contrary to the sworn affidavits of Plaintiffs' experts as well as Defendants' own experts. It is also in direct conflict with the documentary evidence supporting Plaintiffs' responses to the various motions for summary judgment. Furthermore, it is in direct conflict with the evidence presented in the Statement of Facts in Appellants' Original Brief and in the argument of their Reply Brief.

Farmers has charged agents more for equipment purchased through Farmers to access the System as compared to available alternatives. [R 2826B at 15-17, AE 69-75,42,49,76-89]. Farmers charged agents for start up kits as well as monthly fees for access.

Farmers continued to charge agents $150 for start up kits even though internal memos indicate that agents were being overcharged. [R 2826B at 15, AE 69-71]. Farmers was selling agents IBM 3196 terminals for $1,224 when they knew third parties were selling them for $460.[R 2826B at 415, AE 72-74]. According to Farmers' own expert and its own internal reports, since 1983 a compatible one terminal PC was significantly less expensive than a single terminal System 36 sold by Farmers; the PC price never exceeded $8,000 to $10,000 on the open market while Farmers charged agents between $10,650 and $19,400 for IBM computers. [R 2826B at 16,17, AE 75,89]. In 1990 IBM advised Farmers of the existence of various options to the current system that would cost agents less than $5,000 each when Farmers was continuing to charge agents approximately $20,000 for its computers to perform the same functions. [R 2826B at 16, AE 42,49]. In 1991, Farmers was still charging agents as much as $22,392 for computers to access the System.[R 2826B at 16-17, AE 87,88].

Farmers' own expert concluded that Farmers agents paid an average of seven thousand five hundred dollars ($7,500.00!) more to purchase a system 36 through Farmers than they would have paid for a comparable PC or clone. "[A] stand-alone PC is significantly less expensive than a single terminal s/36." [R 2826B at 16, AE 77]. Farmers was aware that third party vendors were offering used IBM and compatible systems at substantially lower cost. One such vendor, Liberty Computer, Inc., offered to supply such used IBM computers to Farmers for sale to agents on its waiting list for less money than Farmers was charging and Farmers refused. [R 2826B at 16, AE 78-82, 87(pg.120)]. Farmers was aware at various times throughout the relevant time period that identical peripherals and terminals were available through third-party vendors at prices lower than Farmers' prices to its agents. [R 2826B at 16, AE 81,32,83,84,86]. Appellants' experts clearly set forth in their reports that alternatives existed and that they were less expensive than the Farmers' options. [R 2826B at 16, AE 85]. Farmers' computers were not "specially configured" as this Court contends. Farmers was aware than any IBM clone could access on-line if allowed to do so with no adverse impact upon the System. [R 2826B at 6, AE 15].

Farmers' own Tax Administration's Review of the Technology Leases in July, 1993, stated that agents were contractually bound to pay between $22 Million and $26 Million more than what their computers were worth. [AE 111 at 3].

All of this evidence was proffered for review by this Court as well as the District Court. The District Court somehow neglected to docket most of this evidence.[2] Now this Court has apparently overlooked it as well.

IV. Sufficient summary judgment evidence exists to demonstrate the existence of price discrimination between certain classes of agents.

Kodak defines price discrimination to include a refusal to sell the tying product to those who refused to buy the tied product. *Kodak* at 476. In *Kodak*, price discrimination was practiced "by selling parts to customers who service their own equipment, but refusing to sell parts to customers who hire third-party providers." *Id.* In the present case, Farmers allowed the owners of old machines (5280s) to continue to achieve access without requiring mandatory service agreements, while purchasers of more recent equipment were denied access unless they obtained expensive service through Farmers. [R2826 B at 12; AE 56 at 96,113]. Thus, Farmers took full advantage of agents who were seeking to buy the most recent of Farmers' computers while allowing those with machines nearing the end of their usefulness—those with lower switching costs—to achieve access at lower expense.

Since 1993, Farmers has allowed certain, more sophisticated, agents to achieve access using non-Farmers equipment while, at the same time charging less sophisticated agents outrageous prices for new and used Farmers' equipment. [R2826 B at 12-13; AE 56]. Agents who purchased 5280 systems directly through Farmers were

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[2] See Appellants' Original Brief, Statement of the Case at 5, Argument at 19, and Statement of Facts at 6 fn. 1.

allowed access while those purchasing the same systems through other agents (even though originally purchased directly through Farmers) were denied access. [R2826 B at 19; AE 99, 100]. By the same token, Farmers refused to give certain classes of insurance referrals to agents who did not buy computers through Farmers as a way of punishing those who refused to subsidize Farmers' computer system. Using the *Kodak* definition, these sorts of differential treatments qualify as price discrimination and serve to conflict with this Court's assertion that Plaintiffs offered no evidence of price discrimination.

V. Since Farmers undeniably has monopolistic control over the tying product and has succeeded in overcharging its agents for tied products, and since proof exists of price discrimination, sufficient summary judgment proof exists to demonstrate market power and antitrust violation.

Plaintiffs' market expert, a senior economist with Economists Inc. of Washington, D.C., defined the relevant market for electronic access to Farmers' policy and policyholder information. He identified Farmers as sole vendor in this market. He showed that Farmers had power in this market in that Farmers was able to set its price without being subject to the imposition of pricing by competitive process. He further showed that Farmers exercised its market power by tying the purchase of electronic access and the purchase of computers, peripherals, and service. "Agents' fully loaded cost for electronic access (the total cost of all of the necessary inputs to effect electronic access including the computer at the agent's office as well as any direct access charge) often, and perhaps always, far exceeded the fully loaded cost agents would have paid if Farmers had allowed them to access ACS via hardware purchased from third parties. The Seller can only force buyers to pay such overcharges if that seller has market power." [R 2829; AE 114 at 13-15, quoted at length in Appellants' Reply Brief at 10-11].

This Court's Opinion states:

"Without an allegation that price discrimination occurred or evidence that Farmers agents faced prohibitive costs in discovering Farmers' computer policy, the plaintiffs cannot

seriously argue that Farmers had or exploited any market power."

[O. at 4584].

Without waiving any argument that no such threshold allegations are required since *Kodak*, Plaintiffs have demonstrated both price discrimination and prohibitive information costs and have raised a question of material facts as to whether Farmers had market power in the market for electronic access to policy information.

REQUEST FOR ANSWER

Appellants respectfully request that the issues of relevant market and market power be reheard in light of a complete review of all of the summary judgment evidence presented by Plaintiffs and are confident that such a review will prove Plaintiffs are entitled to a trial on the merits. Should the Court deny Appellants' request for rehearing, Appellants further request an answer for the purpose of clarifying the above-referenced inconsistencies.

Respectfully submitted,

RENTEA & ASSOCIATES

/s/

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ATTORNEYS FOR PLAINTIFFS / APPELLANTS

DATED: August 7, 1996

(2)
Supreme Court, U.S.
FILED
96 981 DEC 4 1996
OFFICE OF THE CLERK

No. ____

In The

Supreme Court of the United States

October Term, 1996

UNITED FARMERS AGENTS ASSOCIATION, INC., *et al*,
Petitioners,

v.

FARMERS INSURANCE EXCHANGE, *et al.*,
Respondents.

Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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1800

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX A
PETITION FOR REHEARING TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT SA-1

SUPPLEMENTAL APPENDIX B(1)
JUDGMENT IN CIVIL CASE IN THE U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS SA-2

SUPPLEMENTAL APPENDIX B(2)
ORDER AMENDING JUDGMENT IN CIVIL CASE IN THE U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS SA-3

SUPPLEMENTAL APPENDIX C
RESPONDENT PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION SA-4

SUPPLEMENTAL APPENDIX D
REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE SA-35

SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-50559

UNITED FARMERS AGENTS ASSOCIATION, INC.; Thomas J. Vinson; Robert D. Moon,

Plaintiffs-Appellants,

v.

FARMERS INSURANCE EXCHANGE, a California Reciprocal or Inter-Insurance Exchange; Fire Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Truck Insurance Exchange, a California Reciprocal or Inter-Insurance Exchange; Mid-Century Insurance Company; Farmers New World Life Insurance Company,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas, Austin

ON PETITION FOR REHEARING

(September 5, 1996)

Before GARWOOD, DAVIS AND DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied

ENTERED FOR THE COURT:
W. Eugene Davis, United States Circuit Judge

SUPPLEMENTAL APPENDIX B(1)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED FARMERS AGENTS ASSOCIATION, INC., AND THOMAS J, VINSON, ET AL — JUDGMENT IN CIVIL CASE

V. — CASE NUMBER: A-92-CA-373-LDB
CONSOLIDATED WITH A-92-CA-374

FARMERS INSURANCE EXCHANGE, ET AL

Decision by Court. This action came to trial or hearing before the Court. The issued have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Report and Recommendation of Magistrate Judge Stephen H. Capelle, filed April 6, 1995, is in all matter APPROVED AND ADOPTED and Defendants' Motion for Summary Judgment and to Dismiss as a Class Action and Denial of Class Certification should be granted and Plaintiffs' Motion for Class Certification should be denied;

IT IS FURTHER ORDERED the above-captioned cause of action is DISMISSED WITH PREJUDICE.

IT IS FINALLY ORDERED the costs of the above-cause of action are to be assessed to the Plaintiffs in this matter.

DATED: June 7, 1995 — WILLIAM G. PUTNICKI, CLERK

SUPPLEMENTAL APPENDIX B(2)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

UNITED FARMERS AGENTS
ASSOCIATION, INC., AND
THOMAS J, VINSON, ET AL

V. CASE NUMBER: A-92-CA-373-LDB
CONSOLIDATED WITH A-92-CA-374

FARMERS INSURANCE
EXCHANGE, ET AL

ORDER

ON this day came before this Court Plaintiffs' Motion to Alter or Amend this Court's Judgment dated June 7, 1995, and the Court, after considering the Motion and the response, finds that it is meritorious and should be in all things GRANTED.

IT IS THEREFORE, ORDERED that this Court's Judgment of June 7, 1995 is hereby amended to provide that the supplemental claims filed by United Farmers Agents Association, Inc. are dismissed without prejudice.

SIGNED this 19th day of June, 1995.

Lucius D. Bunton, III
Senior District Judge

SUPPLEMENTAL APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED FARMERS AGENTS
ASSOCIATION
Plaintiff,

V.

A-92-CA-373-JN
CONSOLIDATED WITH
A-92-CA-374

FARMERS INSURANCE EXCHANGE,
ET AL.
Defendants

and

THOMAS J. VINSON ET AL. AND
ROBERT D. MOON ET AL.
Plaintiffs

V.

FARMERS INSURANCE EXCHANGE,
ET AL.
Defendants

RESPONDENT PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

NOW COME Thomas J. Vinson, Robert D. Moon, individually and as designated class representatives of a liability class certified by this Court in February, 1994, and along with the United Farmers Agents Association (hereinafter "Plaintiffs") and file this their Objections to the Report and Recommendation of the United

States Magistrate Judge and state as follows:

I.

OBJECTIONS TO THE BACKGROUND FACT STATEMENT

1. The Magistrate, on page 9, states, "The information available online from FANS was then and still is also available on paper through written manuals, publications, and policy records." Plaintiffs object to this statement because agents do not have the ability to access the same information via the telephone, fax machine, and mail without computer linkup. Some information is only available through online access. (See CF 25 Exh. 63)[1]. This also ignores the fact that agents making changes to policy information are immediately aware that the changes have been entered rather than relying upon the possibility that change requests have been properly processed.

2. The Magistrate, on page 10, states, "Farmers agents do not pay for access to the policy holder information but must use an approved computer to electronically access the policyholder information." Plaintiffs object to this statement and the paragraph containing it because it ignores substantial evidence to the contrary. In fact, the Agency Network Service Agreement ("ANSA") requires agents to purchase electronic access to mainframe information as well as restricting them to purchasing computer systems and maintenance through Farmers. In other words, the ANSA is based on two types of consideration—1.) monthly payments, and 2.) promises to purchase computers and peripherals only from Farmers. (See ANSA contract,

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[1] "CF" refers to the Plaintiffs' Summary of Contravening Facts presented in opposition to the Defendants' various motions for summary judgment. The full text of the CFs can be found at pages 4-20 of Plaintiffs' Response to Defendants' Motion and Brief for Summary Judgment Against Plaintiffs Vinson and Moon. A courtesy copy of pages 4-20 was attached to the original as Exhibit "A." Each CF in turn references the specific exhibit(s) which support(s) the contention of the CF. The Plaintiffs' references to various CFs in this pleading is not intended to exclude as supportive all the other CFs but are merely offered in an attempt to point out sources of facts and evidence which form the basis of their objections herein.

at CF 8 Exh. 10). Electronic access is therefore sold to agents under the terms of the ANSA contract. There are no exceptions; district managers have to pay for access to mainframe information, too. Thus, even if agents achieve access through their district managers' systems, that access has been paid for.

3. Plaintiffs object to the fact that the magistrate omits from the background information section any mention of the service/maintenance agreement requirement or the requirement that peripherals be purchased from Farmers. Plaintiffs have claimed that Farmers requires that agents purchase service/maintenance agreements and peripherals through Farmers and that those are also tied products in the alleged tying arrangement. According to the ANSA contract, not only must the service be purchased on systems purchased through Farmers, but it is required for equipment and peripherals recently allowed to be purchased from third party vendors. Agents not purchasing specified service are denied access. (See CF 17 Exh. 55).

II.
OBJECTIONS TO PROCEDURAL HISTORY

4. Plaintiffs object to the incompleteness of the Procedural History section of the magistrate's report in that it omits any reference to the April 8, 1993, Order denying Defendants' 12(b)(6) Motion. (See Order). That Order is of paramount importance to this case because it sets forth law of the case. It states unequivocally, for instance, that, "A plaintiff can state a claim for an illegal tying arrangement even if the plaintiff has not purchased or leased both products." (Order at 19). This is one point of law that the magistrate ignores in his report. That Order, among other things: sets forth *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992) as controlling precedent for the determination of tying arrangement issues; defines the tying product and the method for determining it and its market through a demand-based analysis; defines the tied product and the method of determining it and its market; and includes within its definition of the tied product the requirement of maintenance service.

5. Plaintiffs object to the incompleteness of the

Procedural History section of the magistrate's report in that it omits the Plaintiffs' request for an evidentiary hearing in September of 1994 in order to allow the court to certify a damage class before trial. This omission results in the Report's failure to adequately alert the court to the fact that, although the Court certified a global liability class, it has yet to designate damage classes under FRCP 23(b)(3).

6. By the same token, Plaintiffs object to the incompleteness of the Procedural History section of the magistrate's report in that it omits mention of their request to bifurcate the case into a liability and a damage cause because no damage class had yet been certified at the end of discovery.

III.
OBJECTIONS TO THE REPORT'S STANDARD OF REVIEW

7. Plaintiffs object to the Magistrate's use of an incorrect summary judgment standard of review. The appropriate standard of review for a motion of summary judgment in a federal antitrust tying arrangement case was set forth in *Kodak* by the U.S. Supreme Court in 1992. This Court recognized that *Kodak* was of primary precedence in this case in its 12(b)(6) Order setting forth the law of the case. *Kodak* states that, for a summary judgment determination in a tying case, "[t]he evidence of [respondents] is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Kodak* at 2077. The Supreme Court further states in describing the proper method of summary judgment review in a case of this type: "Mindful that respondents' version of any disputed issue of fact thus is presumed correct, we begin with the factual basis of respondents' claims." *Id.* This the Magistrate does not do. Not only does his analysis begin and end with the movants' claims, but in the process of making his recommendations and report the Magistrate only refers to one out of the respondents' one hundred and fourteen contravening facts. The Magistrate fails to demonstrate how any of the Plaintiffs' contravening facts are controverted by any of the Defendants' specific facts.

8. Plaintiffs object that the Magistrate does not afford Plaintiffs' evidence the credence required at this stage of the judicial

process. Plaintiffs object that the Magistrate throughout the report does not give them the benefit of all justifiable inferences as is also required at this stage of the judicial process. Stated differently, the Magistrate is obligated to show bias in favor of Plaintiffs. Plaintiffs object because the Magistrate obviously shows bias in deference to the Defendants.

9. Plaintiffs object to the order in which the evidence has been analyzed.

10. Plaintiffs object to the fact that the contravening facts submitted by the Plaintiffs are not listed among the documents considered by the Magistrate related to the motion for summary judgment against Vinson & Moon.

11. Plaintiffs object to the fact that the contravening facts submitted by the Plaintiffs are not listed among the documents considered by the Magistrate related to the motion for summary judgment against UFAA.

12. Plaintiffs object to the fact that the contravening facts submitted by the Plaintiffs are not listed among the documents considered by the Magistrate related to the motion for partial summary judgment against Vinson and Moon.

13. Plaintiffs object to the fact that the contravening facts submitted by the Plaintiffs are not listed among the documents considered by the Magistrate related to the motion for dismissal of class certification.

14. Plaintiffs object to the fact that the contravening facts submitted by the Plaintiffs are not listed among the documents considered by the Magistrate related to the Plaintiffs' request for class certification.

15. Plaintiffs object to the Magistrate's statement on page 13 that Fed. R. Civ. P. 56(e) and *Tubacex v. M/V Risan* stand for the proposition that general allegations cannot demonstrate a genuine issue for trial. There is no reference in either cite that justifies the

"not mere general allegations" comment. The Magistrate has not specifically identified any of the Plaintiffs' evidence, or justifiable inferences from it, as supporting mere general allegations, nor has he tendered his definition of the term "general allegations", nor has he suggested that any of the Plaintiffs' allegations are too general.

16. Likewise, Plaintiffs object to the Magistrate's quoting a predatory pricing conspiracy case, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.* The Magistrate quoted a section stating that the non-movant fails to meet some standard if its response merely shows "some metaphysical doubt as to material facts." If the Magistrate is suggesting by this citation that Plaintiffs' arguments are unsupported or raise but a metaphysical doubt, he has not specifically identified any of the Plaintiffs' arguments or any of the Plaintiffs' one hundred and fourteen contravening facts as merely showing metaphysical doubt, nor has he even defined the term "metaphysical doubt" for the purpose of informing this Court of the purpose of this citation.

IV.
OBJECTIONS TO RECOMMENDATION FOR SUMMARY JUDGMENT AGAINST VINSON AND MOON LIABILITY CLASSES

17. Plaintiffs object to the Magistrate's characterization of Plaintiff's allegations on page 18, where the Magistrate states that "Plaintiffs claim that electronic access to the policyholder information is a tied product and therefore violative of the Clayton Act." Plaintiffs have always alleged the opposite—that electronic access to mainframe information is the *tying* product not the *tied* product. This conforms with the determination of this Court in the 12(b)(6) Order. This apparent confusion of the Magistrate as to this basic premise of the Plaintiffs' allegations and the fundamental difference between the *tied* and the *tying* product makes suspect all of the subsequent analyses, conclusions, and recommendations. No one has ever alleged that access is the *tied* product. The computer systems, peripherals, and service/maintenance agreements required to be purchased only through Farmers were alleged to be and are the *tied* products.

18. Plaintiffs object to the Magistrate's characterization

of their allegation concerning which written agreements comprise the written contractual tie at issue in the present case. The Magistrate states on page 18 that an agent requesting access is required "to enter into a written agreement concerning the purchase of a specific IBM computer and service." Plaintiffs have always asserted that there are three written agreements—the Agency Network Service Agreement ("ANSA"), the Computer Installment Sales and Security Agreement ("CISSA"), and the service/maintenance agreement—which comprise the written tie. This objection is of particular import since the Magistrate repeatedly ignores the existence of the ANSA contract and its terms requiring the payment of a monthly fee by agents to Farmers for electronic access to Farmers mainframe information in his analysis of the separate product status of that access. Not only does ANSA require monthly payment of fees for access, but it also requires approval by Farmers of any computer systems used for achieving access and peripheral equipment attached to those systems. Plaintiffs' evidence and inferences from it indicates that Farmers never approved any other computers except those sold through Farmers for that purpose. (See CF 9, 12, 15). The CISSA contract requires that those buying or leasing Farmers' computer systems also purchase service/maintenance agreements from Farmers or IBM.

19. Plaintiffs object to the Magistrate's characterization of their allegation concerning the tying arrangement. On page 18, the Magistrate states that Plaintiffs allege "electronic access is tied to the purchase of the computers. Once again the Magistrate has reversed the *tying* and the *tied* products. The *tied* products are the computer systems, peripherals, and service/maintenance agreements required to be purchased only through Farmers. Computer purchase, therefore, is tied to electronic access to mainframe information, which is the *tying* product.

20. On page 18, the Magistrate states, "Plaintiffs assert that there is ample evidence to show Farmers possesses market power in the relevant market, which is the online access; therefore, the element of anti-competitive effect is also proved." Plaintiffs object to the last part of this statement because the Plaintiffs have never asserted this; the Magistrate confuses two separate antitrust issues concerning market power and anti-competitive effect and attributes

that same confusion to the Plaintiffs. While it is true that the relevant market in which Farmers possesses absolute power is the market for electronic access to mainframe information, the anti-competitive effect is on the market for the *tied* products—the market for computer systems, peripherals, and maintenance service which includes buyers, sellers, and products and services. That anti-competitive effect is proved separately from market power in the *tying* market; Plaintiffs have proffered evidence of harm to vendors seeking to sell computers to agents who cannot because of the contract; evidence of harm to agents who overpaid; and evidence of harm to agents who refused to overpay. (See evidence in section *infra* objecting to the Magistrate's conclusions as to fact of damage).

A. OBJECTIONS TO MAGISTRATE'S ANALYSIS

21. Plaintiffs object to the Magistrate's interpretation of statements made by Plaintiffs' counsel at the class certification hearing in December, 1993. On page 20, in a paragraph in which he says he is following the dictates of the U.S. Supreme Court to determine whether the evidence raises a genuine material fact question, the Magistrate states that the "statement by the Plaintiffs' attorney at the class certification hearing at least articulates to this Court in a very shorthand fashion what this lawsuit is about." Counsel's quoted statement does nothing of the sort. It merely shows that, at that time, before discovery was completed, counsel did not wish to argue in a class certification hearing the issue of whether manual access to the mainframe is equivalent to electronic access. The quoted statement was not intended to be an admission to be used at a later stage in the case after extensive discovery. Since that time evidence has been presented that manual access is not equivalent: some types of rate quotes, for example, can not be obtained manually; manual access is so slow and inconsistent as to cause loss of business; Farmers has reduced the staff available to provide manual access; and the agents have no immediate way of knowing that manual changes have been correctly entered. (See CF 25). It is unclear from his comment what the Magistrate thinks that counsel articulated, but it certainly should not be described as the basis of this lawsuit. It remains hotly disputed that all mainframe information available through electronic access is of equal benefit to agents as that manually available.

A.1. OBJECTIONS TO MAGISTRATE'S PRODUCT AND TYING ANALYSIS

22. On page 22, the Magistrate states, "The undersigned ***feels*** that the Plaintiffs have presented no evidence to establish that electronic access to the policyholder information in the Farmers mainframe computer is a product." (Italic emphasis added). Plaintiffs object because the Magistrate is basing his summary judgment recommendation upon a subjective sense of the weight of the evidence. Notwithstanding the fact that what the Magistrate "feels" is wrong, this method of reviewing a crucial element of the Plaintiffs' claim is improper. This is diametrically opposed to the proper standard of review provided *supra* from *Kodak*.

23. Plaintiffs object to the Magistrate's conclusion (without stating the definition for "product" he used to come to this conclusion) that there is no evidence establishing that electronic access is a product. A summary judgment recommendation requires that all of the Plaintiffs' evidence and allegations be presumed true. The evidence presented by the Plaintiffs shows as follows:

- there is expert testimony defining electronic access as a separate product;
- this Court defined electronic access as the tying product in its 12(b)(6) Order;
- there is expert testimony defining the relevant market for the access product;
- agents wishing to purchase access do so under the terms of the ANSA contract;
- ANSA requires agents to pay a monthly fee for access;
- ANSA requires agents purchase a computer system and peripherals through Farmers;
- ANSA requires agents purchase maintenance service through Farmers; and
- access and computers recently have been sold separately to those buying computers outside.

(See Exh. 114 (see Affidavit of Bogdan Rentea in Support of Plaintiffs Opposition and Responses to Defendants' Motions for

Summary Judgment), CF 8, 10, 21). The conclusion of the Magistrate is in conflict with his statement on page 24, "Electronic access to the policyholder information in Farmers is a 'product' not sold to any outside individual or firm, it is only offered to Farmers agents." Moreover, the conclusion of the Magistrate is in conflict with common sense; it is like saying that telephone service is not a product because it cannot be achieved without the use of a telephone. Following the logic used by the Magistrate, this Court would be forced to assume, for example, that there can never be separate markets for cameras and film, computers and software, or automobiles and tires. This is an assumption the U.S. Supreme Court was unwilling to make. (See *Kodak* at 2080). "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19, n. 30, 104 S.Ct. 1551, 1562, n. 30 (1984). The nature of the conflict in the Magistrate's position is evident in his statement, on page 22, that "The product that is important to the Farmers agents (Plaintiffs) is the information contained in the mainframe computer...." The information is of no use to Plaintiffs if they do not purchase access to the mainframe; that is what Farmers sells the agents through ANSA.

24. Plaintiffs object to the Magistrate's gratuitous conclusion that there is "no open market for the policyholder information". Plaintiffs have not alleged that the information *itself* is the tying product and therefore the market for information is not relevant here. The relevant tying market is the market consisting of buyers and sellers of electronic access to mainframe information. Since *Kodak*, how restricted that market may be is of no consequence. (See *Kodak* at 2080, 2085-7, 2096). There was no "open market" for Kodak copier parts, either, at least not beyond the limited number of copier owners and service providers. Yet, the U.S. Supreme Court rightfully denied summary judgment against the Plaintiffs in that case. Stated differently, the U.S. Supreme Court refused to look at the market of all copiers and limited its analysis to Kodak copiers.

25. Plaintiffs object to the Magistrate's conclusion that there is no evidence to show that there is a tying arrangment. On page 23, the Magistrate states, "There is no evidence before this

Court to show that there is any tying arrangement instituted by Farmers other than the requirement that an agent sign an Agency Appointment Agreement in order to obtain policyholder information." Again, the Magistrate confuses the issue of what is the tying and tied products. The Plaintiffs allege and this Court has agreed that the tying product is electronic access to mainframe information, not the information alone. The written tying arrangement is therefore contained in the ANSA and the CISSA contracts, not the Agency Appointment Agreement ("AAA"). The evidence of the tying arrangement is voluminous. It consists of the ANSA and CISSA contracts themselves, testimony as to the meaning of the contracts, evidence of the concealment of the actual policy concerning certain terms of the contracts, testimony of a competitor in the computer market, and expert testimony upon the existence of the tying arrangement. The Magistrate does not even discuss any of this evidence, nor does he show how it does not fit into the definition of a tying arrangement as promulgated by *Kodak*.

"A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Kodak* at 2079. Evidence has been proffered that agents purchase electronic access through the ANSA agreement, which provides that they cannot buy computer systems or peripherals except with Farmers expressed approval. Inferences from other evidence are that Farmers only approved purchase of computers and peripherals sold by Farmers and had a policy not to grant written permission for other equipment. By the terms of the ANSA contract, Farmers would only sell access to agents agreeing not to buy computers elsewhere. (See Butler, Ratkovich, et al; CF 9, 11, 12, 15, 17).

26. Plaintiffs object to the Magistrate's conclusion that Farmers does not sell online computer services. On page 23, the Magistrate states, "The record is replete with evidence that Farmers Insurance sells insurance, not online computer services, not computers." This conclusion is based upon defense exhibits only. It ignores ANSA, through which Farmers sells online access to agents for a fee and the promise not to buy elsewhere.

27. Plaintiffs object to the Magistrate's conclusion that Farmers does not sell computers. In the above-referenced quotation, the magistrate has ignored: the CISSA contract and the thousands of computers Farmers sold or leased to its agents; statements that the purpose of the AIMS proposal in 1994 was *inter alia* "to get Farmers out of the computer business"; and testimony from another vendor that he considered Farmers to be a competitor harming his own computer business. (See CF 41, Exh. 87 (see Affidavit of Bogdan Rentea in Support of Plaintiffs Opposition and Responses to Defendants' Motions for Summary Judgment)). The Magistrate based his conclusion solely upon the Defendants' argument, contrary to proper summary judgment procedure.

28. Plaintiffs object to the Magistrate's interpretation of the details of the tying arrangement. On page 23, the Magistrate states that agents' options of electronic access are limited "under certain guidelines." Those "certain guidelines" are the contractual tie, specifically requiring approval by Farmers for all computer and peripheral purchases or leases for the purpose of achieving access and specifically requiring maintenance service through Farmers. Evidence was presented by Plaintiffs that approval for purchase outside of Farmers was never granted. Evidence was presented by Plaintiffs that it was Farmers' policy to prohibit access to agents wishing to purchase, lease or use outsourced equipment and that its actual policy was fraudulently concealed. Evidence was further presented that access would be withdrawn if maintenance service was obtained elsewhere. (See CF 9, 11, 12, 15, 17). On page 32 of his report, the Magistrate, in an apparent reversal of his opinion, states: "There is no doubt from the evidence presented that Farmers made a decision that access to the FANS would only be permitted with equipment specifically approved by Farmers. This decision initially required that agents purchase IBM computers from Farmers. It was not until July of 1993 that agents were permitted to purchase computers from other sources."

29. Plaintiffs object to the Magistrate's characterization and oversimplification of the benefits of electronic access. On page 33, the Magistrate states, "By using a computer, a Farmers agent gains only speed of access to the policyholder information." This

conclusion is based on Defense exhibits only. It ignores the Plaintiffs' evidence to the contrary: Farmers' own survey comparing production of agents with access to those without; testimony that Farmers agents can no longer survive without electronic access; and testimony that there is mainframe information only available through electronic access. (See CF 25, 26, 27).

30. Plaintiffs object once again to the Magistrate's characterization of the *tied* product and the nature of the *tying* arrangement. On page 24, the Magistrate states, "Plaintiffs allege that the electronic access was sold as one product tied to the purchase of IBM computers from Farmers." Plaintiffs have actually alleged, and this Court has so defined, the electronic access to mainframe information is the *tying* product. The computer systems, peripheral equipment, and maintenance service are the *tied* products. Thus, purchase or lease of the computer systems, peripheral equipment, and maintenance service is tied to the purchase of electronic access. The Magistrate is basing his analysis upon a reversed notion of the basic premise of Plaintiffs' allegations. By now this Court should have noted that this basic premise error carries on throughout the Magistrate's report and poisons all of the Magistrate's recommendations.

31. Plaintiffs object to the Magistrate's misstatement of the nature of the transaction through which agents obtain the *tying* product. On page 24, the Magistrate states, "Farmers agents never paid for the policyholder information obtained manually or electronically." This implies that electronic access to the mainframe information was never paid for. The ANSA contract is based upon two types of consideration in return for the sale of access: 1.) monthly payment of fees, and 2.) promises to purchase computers and peripherals only from Farmers. (See CF 8). Again, this objection is required due to the Magistrate's faulty notion of the nature of the *tying* product as well as the fact that the Magistrate is relying exclusively upon the Defendants' allegations to support his conclusions.

32. Plaintiff's object to the Magistrate's conclusion that electronic access to the info is not a "product" capable of tying

computers. On page 24, the Magistrate concludes, "For all these reasons, electronic access to the information contained in FANS is not a "product" capable of tying IBM computers, and there is no antitrust violation." Plaintiffs object to this conclusion and/or the analysis resulting in this conclusion for all of the above-listed reasons including, but not limited to: the fact that it is based on Defense exhibits only; it lists none of the Plaintiffs' contravening evidence; and it does not show how the Plaintiffs' evidence is disputed or contravened. Plaintiffs further dispute this conclusion because the Magistrate does not define "product" nor does he describe the source of any standards he uses to decide that electronic access is not a product. *Kodak* defines product based on demand in the marketplace. (See *Kodak* at 2082 and *generally*). The Magistrate does not mention *Kodak* or its definition in its analysis.

The Plaintiffs have submitted evidence that access and computers or peripherals recently have been sold separately to those who have not purchased computers through Farmers. (See CF 10, 21). Yet, the Magistrate assumes that there is no demand for access separate from computers. In *Kodak* and *Jefferson Parish*, the U.S. Supreme Court discusses the fallacy of this logic. (See Objection paragraph 25, *supra*). What the Magistrate is saying, essentially, is that when you buy a telephone you can buy the conversation you might have with someone you call, but the telephone company can't sell you access to that conversation. If that is true then Southwestern Bell owes us all a lot of money.

A.2. OBJECTIONS TO MAGISTRATE'S CONSUMER ANALYSIS

33. Plaintiffs object to the Magistrate's characterization of agents as non-consumers. Even though the *Kodak* standard of review does not require designation of agents as consumers, or even Plaintiffs as consumers, the Magistrate states, on page 24, that "it then becomes necessary to decide whether the agents are consumers." The Magistrate ignores the fact that, since electronic access to mainframe information is sold to agents for a fee under the terms of the contract, they are consumers in the market for access. The Magistrate has based his conclusion that agents are not consumers on

the lack of *outside* demand for electronic access. Evidently, he has misconstrued the relevant *tying* market which consists of the buyers of access (agents), the sellers of access (Farmers), and the *tying* product (electronic access to mainframe information). (See expert report, Exh. 114 (see Affidavit of Bogdan Rentea in Support of Plaintiffs Opposition and Responses to Defendants' Motions for Summary Judgment)). *Outside* demand is not a requirement since *Kodak*. In *Kodak* there was no *outside* demand for Kodak copier parts other than copier owners and service providers; yet, summary judgment was denied because Kodak had sufficient market power in the *tying* market for parts to force anti-competitive effect upon the *tied* market for service. The same situation exists in the present case. Furthermore, the Magistrate's analysis denies the status of agents as consumers in the market for computers capable of achieving on-line access to mainframe information, the market for peripherals, and the market for maintenance service. Again, the evidence supporting this objection is that: agents purchase access from Farmers through the ANSA contract; the consideration paid for access is monthly fees and promises not to purchase outside; agents purchase computer systems through CISSA; the consideration paid for the equipment is the installment payments and promises to purchase maintenance service through Farmers. (See CF 7, 8).

A.3. OBJECTIONS TO MAGISTRATES ANALYSIS OF COERCION ISSUES

34. Plaintiffs object to the Magistrate's reliance upon proof of individual coercion as requirement for illegal tying arrangement and his method of determining its existence. The standard supplied by this Court in its 12(b)(6) and provided *supra* from *Kodak* defining tying arrangements such as those alleged in this suit does not require the proof of coercion that the Magistrate proposes. The Supreme Court in *Eastman Kodak* does not mention coercion as a requirement; rather, the closest it gets to coercion is when it requires a showing that there were "forced unwanted purchases." (See *Kodak* at 2089 fn.29) The ability to force such unwilling consumption is "inferred from the seller's possession of a predominate share of the market." (*Id.* at 2081). Thus, if appreciable economic power is proven under the *Kodak* scheme of analysis, it is

unnecessary to prove coercion because, as the Supreme Court states, "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." (*Id.* at 2082). Finally, where there is a written tie, coercion is presumed. "[I]n certain circumstances, the element of coercion can be established on the basis of a formal agreement. Thus, where one product is sold on the express contractual condition that the purchaser purchase supplies for that product in the future only from the seller, the purchaser's future course of action is limited by that contract, and coercion is found in the agreement itself." *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1328 (5th Cir. 1976). Therefore, ANSA and CISSA contracts themselves coupled with Farmers' undisputed absolute control over the relevant *tying* product market are proof of coercion.

A.4. OBJECTIONS TO MAGISTRATE'S MARKET POWER ANALYSIS

35. Plaintiffs object to the Magistrate's attempt to define the relevant markets and determine whether Farmers has the requisite market power. Both Plaintiffs and Farmers have submitted affidavits on those issues from their respective experts. As one might anticipate, the conclusions reached by the experts are diametrically opposed. Given that fact, the Magistrate's job is done; all he has the right to do is report that fact. Summary judgment on that issue is not appropriate. Since the Magistrate, however, went on to determine the relevant markets and Farmers' market power, the Plaintiffs offer the following objections:

Plaintiffs object to the Magistrate's disregard for the U.S. Supreme Court's definitions of market power in tying arrangement antitrust from *Kodak*. This Court set forth the *Kodak* definition of market power as the standard for this case in its 12(b)(6) Order. That Order and *Kodak* define appreciable power in the tying product market as "enough to force a purchaser to do something that he would not do in a competitive market." Plaintiffs have presented evidence that the agents would not voluntarily pay over $20,000 for the Farmers computer system had they been allowed to purchase viable alternatives in the outside PC market for substantially less than

half that price. The same holds true for peripherals and maintenance service. Farmers knew the alternatives existed at a smaller price. Farmers knew that those alternatives posed no risk to the integrity of the mainframe. Yet, since they had a monopoly over the *tying* product, Farmers refused to sell access without requiring the purchase of computers, peripherals, and maintenance service from Farmers. (See CF 13, 31, 33). According to *Kodak* this is sufficient evidence to show market power in the *tying* market.

36. Plaintiffs object to the Magistrate's basing his analysis on the determination of a lack of market power in an irrelevant market. On page 27, the Magistrate concludes, "There is no evidence to support any proposition that Farmers has sufficient market power in the insurance sales industry to give rise to a violation of antitrust law." Plaintiffs have never alleged that the insurance industry was the relevant market in the present case. Respondents have presented evidence of actual events from which a reasonable trier of fact could conclude that competition in the insurance industry does not, in reality, curb Farmers' market power in the computer access or computer purchase market as defined contractually with its agents. (See *Kodak*, 903 F2d 612, 617 (9th Cir. 1990)). The relevant *tying* product market has always been the market for electronic access to mainframe information. On page 27, the Magistrate himself agrees that, "Farmers only has the complete power to control access to its own policyholder information." Plaintiffs agree. And, when Farmers decides to sell that access and uses its power to require purchases of *tied* products that agents would prefer to buy elsewhere, it becomes an illegal tying arrangement in violation of antitrust law.

37. Based upon newly-acquired evidence, the Plaintiffs object to the Magistrate's characterization of AIMS as having six options. The Magistrate, on page 28 states, "The access to the FANS has been increased in 1994, subsequent to the filing of this suit, to provide at least six different options for agents to access the FANS." The Magistrate is referring to the so-called AIMS program. Recent discovery has provided evidence that Farmers is reducing the number of computer options available to agents. At least one of the options has been completely deleted. The requirement for a service/maintenance agreement remains and because of that AIMS

Option No. 4 has been summarily withdrawn by Farmers. (See Exh. B). [This is further evidence of the continuing risk of violation described in the UFAA complaint which will be reiterated *infra.*]

38. Plaintiffs' object to the Magistrate's description of the *tied* product market. On page 28, the Magistrate states that "the marketshare for the tied product, IBM-designed computer equipment specifically configured to access FANS, is so small as to have no effect on competition in the computer sales market." The Magistrate chooses to ignore the peripheral electronic equipment market, the maintenance and service market, the used computer market, and the used peripheral market, all of which are negatively impacted by Farmers actions. Plaintiffs have shown that, through Farmers' tying arrangement, over $138,000,000 in computer sales has been illegally withheld from the computer hardware marketplace alone. Since the relevant market includes the buyers and the sellers of the *tied* products, the Magistrate must analyze the impact upon the buyers as well as the sellers of the tied products. Plaintiffs contend that the effect upon the buyers, the agents seeking to achieve electronic access, is not insubstantial.

39. Plaintiffs object to the Magistrate's conclusion, on page 28, that "Farmers has no economic interest in a market for computer equipment." The relevant *tied* product markets are the market for computer systems capable of achieving access, the market for peripheral electronic equipment for those computer systems capable of achieving access, and the market for maintenance service for those systems and peripherals. These relevant markets have a limited number of buyers—agents seeking to achieve access to mainframe information. The Magistrate's conclusion ignores the substantial dollar value of computer and peripheral equipment Farmers has sold and leased and resold and released to its agents. It ignores the value of Farmers security interest in computers and peripherals leased to its agents. It further ignores the substantial inventory of new and used computer systems Farmers accumulated at times over the years. It ignores the extensive waiting lists Farmers maintained for agents seeking to purchase used systems from terminated agents. It also ignores the level of competition in the market for used System 36 computers—one marketplace Farmers'

tying arrangement kept agents from participating in. It ignores competition from other types of computer systems capable of obtaining access. Finally, it ignores the maintenance service market. (See CF 13, 23, 24, 29).

A.5. OBJECTIONS TO THE MAGISTRATE'S FACT OF DAMAGES ANALYSIS

40. Plaintiffs object to any reference in the Magistrate's analysis to specific damages or implied requirement of specific damages to members of the liability classes. Damage classes have yet to be certified. Plaintiffs are required only to provide evidence of the fact of damage at this stage of the proceedings. (See Class Certification Order). For this reason, Plaintiffs' were not required to designate "an expert on damages" nor could they without having a damage class defined by this Court. However, Plaintiffs' experts have testified to the fact of damages. Additionally, the Defendants' designated experts testimony provides evidence of fact of damage. As for the fact of damages to the Moon class, the Defendants' own survey is sufficient to establish them. (See CF 26, 27).

41. Plaintiffs object to the Magistrate's statement that Plaintiffs proffered no evidence concerning the availability of comparable equipment at lower prices. On page 29, Magistrate states, "The Plaintiffs have failed to adduce any evidence that there was comparable equipment available at lower prices which could have been purchased by members of the proposed Vinson class." First of all, the Vinson class has already been designated. The evidence showing fact of damage for that class includes but is not limited to: the report and testimony of expert Lubniewski; the study prepared by Farmers; the report by Farmers' own expert; the testimony of Hugh Morton; and various of Farmers' internal memos. (See CF 29). The Magistrate's statement is in conflict with his conclusion, presumably based upon the evidence presented in this case, on page 32, that "Obviously, there are now a number of products on the open market in addition to the IBM System 36 which are capable of properly accessing the FANS."

42. Plaintiffs object to the Magistrate's statement that

Plaintiffs proffered no evidence concerning the adverse financial impact upon the Moon class. On page 29, Magistrate states, "As for the Moon class, there has been no evidence of any adverse financial impact on any Moon class member because of the member's determination not to purchase computer equipment." The Defendants' own study shows that those who were unable to achieve electronic access, for whatever reason, were financially disadvantaged in that they were unable to achieve comparable levels of production. (See CF 26, 27). The inferences that Plaintiffs have drawn and any justifiable inferences of damages to the Moon class that can be drawn from these studies must be construed by the Magistrate in the respondent Plaintiffs' favor. Under *Sciambra v. Graham News*, 841 F.2d 651, 657 (5th Cir. 1988), lost profits is an appropriate characterization of antitrust injury. Since members of the Moon class have indicated lost profits as a result of the illegal tying arrangement, they have demonstrated fact of damage. The Plaintiffs object to the Magistrate's failure to even discuss the Plaintiffs' evidence and the inferences that can be drawn from it as well as the apparent fact that the Magistrate's conclusion is based on the Defendants' exhibits only.

43. On page 30, the Magistrate describes as "bald allegation" Plaintiffs' contention that there were alternative computer choices available on the open market at lower price than that offered by Farmers. Plaintiffs object to the Magistrate's own bald assertion and offer as rebuttal the evidence described in Plaintiffs Objection No. 41 *supra* and reiterate their objection that the Magistrate has totally ignored Plaintiffs' evidence throughout his report, not to mention the fact that the Magistrate has failed to grant Plaintiffs the benefit of all justifiable inferences of that evidence.

44. Plaintiffs object to the Magistrate's statement that Plaintiffs' experts provided no facts with regard to types or names of computers or price thereof. On page 30, the Magistrate states, "Even Plaintiffs' experts provided no facts with regard to specific types or names of computers, or the price thereof, which would have been available for any of the years at question in this lawsuit." Once again, the Magistrate has denied the existence of a market for used computer systems and peripherals. The Lubniewski report is full of facts concerning the market for used IBM equipment equivalent or identical

to that offered by Farmers. These facts included used as well as new computer price lists. (See CF 29)(See also Plaintiffs Objection No. 41 *supra*).

45. Plaintiffs object to the Magistrate's statement that no evidence of lost profits or commissions was presented for Moon class. See Plaintiffs Objection No. 42 *supra*.

A.6. OBJECTIONS TO MAGISTRATE'S CONSPIRACY ANALYSIS

46. Plaintiffs object to the Magistrate's conclusion that there is no genuine issue of material fact with respect to Plaintiffs' conspiracy allegations. On pages 31-32, the Magistrate states, "There has been no other evidence presented to this court by way of affidavit, interrogatory, or admissible evidence to show this Court that a conspiracy existed." To come to his conclusion, the Magistrate has summarily dismissed Plaintiffs argument and evidence that the agents themselves became involuntary co-conspirators when they signed the contracts containing the written tying arrangement. (See the ANSA and CISSA contracts). Under *Perma Life Mufflers, Inc. v. Intern. Parts Corp.*, 392 U.S. 134 (1968), an antitrust conspiracy can involve involuntary participants, namely the plaintiffs in an antitrust action. *Perma Life* also held that a contractual relationship between an antitrust defendant and an antitrust plaintiff is a sufficient combination between the two parties to meet the definition of conspiracy sufficient to satisfy the Sherman Act. Even though all of the above was presented in Plaintiffs' Response, the Magistrate has chosen to ignore the fact that, since Plaintiffs in this case were unwilling participants in a contractual agreement which included an illegal tying arrangement, sufficient evidence of conspiracy exists to overcome summary judgment.

47. Plaintiffs object to the Magistrate's conclusory statement that Farmers' decision to control access was for legitimate corporate reasons or for safety. Evidence was presented that the purposes behind Farmers' conspiracy was to liquidate computer inventory accumulated by Farmers even though less expensive alternatives existed and to continue to fraudulently conceal their true

policy and the fact that their actions were an illegal tie. Evidence was presented that Farmers knew early on that there never were any increased safety risks to allowing outside purchased equivalent systems or peripherals to be used to access the mainframe. The Magistrate could easily infer from the AIMS options currently allowing access using third-party equipment that there do not exist any safety risks. (See CF 13, 48).

48. For all the above reasons, Plaintiffs object to each and every one of the summary conclusions on pages 33 and 34 of the Magistrate's report and his recommendation that the District Court grant Defendants' Motion for Summary Judgment against Plaintiffs Vinson and Moon.

V.
OBJECTIONS TO RECOMMENDATION FOR SUMMARY JUDGMENT AGAINST UNITED FARMERS AGENTS ASSOCIATION

A.1. OBJECTIONS TO MAGISTRATE'S DEPICTION OF THE FACTS AND STANDARDS

49. Plaintiffs object to the Magistrate's characterization of Plaintiff's Response and UFAA's complaint. Contrary to the Magistrate's description of UFAA's complaint on pages 34 and 35 of his report, UFAA is actually seeking the following:

- A declaration by the Court that the alleged tying arrangement was, is, and would be an unreasonable restraint of trade;
- A declaration by the Court that the Agent Appointment Agreement does not confer upon Farmers any right to impose the tying arrangement on agents;
- A declaration by the Court that the AAA does not confer certain other rights to Farmers;
- A declaration that conduct of Farmers has breached the AAA contract;

- A permanent injunction of Farmers' unreasonable restraint of trade; and
- A temporary injunction of acts breaching the contract based upon a claim of irreparable harm resulting from forced termination.

In support of its claims, UFAA presented arguments supported by case law showing that associational standing, as determined by this Court, of UFAA is proper. This proposition was supported by the 12(b)(6) Order and evidence resulting in that Order.

50. Plaintiffs object to the Magistrate's interpretation of the law in regards to the granting of *permanent* injunctive relief and they further object to his characterization of the Plaintiff UFAA's Response. *Permanent* injunction requirements differ from those for *preliminary* injunctions. A *preliminary* injunction is typically granted during the pendency of a lawsuit to prevent irreparable harm that may result before a final decision on the merits. To obtain a *preliminary* injunction, a movant may prove a substantial threat that he will suffer irreparable harm if the injunction is granted. A *permanent* injunction (as is sought in the present case), on the other hand, is usually granted only after a full trial on the merits. To obtain *permanent* equitable relief, a party need only show that "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *Shanks v. City of Dallas, Texas*, 152 F.2d 1092, 1096 (5th Cir. 1985)(quoting *United States v. W.T.Grant, Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 898 (1953)(emphasis added). Furthermore, in a situation such as this, when there are allegations that the illegal conduct has ceased, "the court's power to grant injunctive relief may survive discontinuance of the illegal conduct in order to prevent future wrongdoing...." *Mississippi State Dept. of Public Welfare, et al. v. United States*, 730 F.2d 306, 325 (5th Cir. 1984). The voluntary cessation of allegedly illegal practices to avoid suit does not moot the controversy. Plaintiff UFAA submitted this standard in its Response and supported its claims with contravening facts showing a cognizable danger of recurrent violation. The recently discovered evidence discussed at Paragraph 37 further shows the need for the injunction.

51. As to the issue of the Magistrate's characterization of the Plaintiff UFAA's Response, Plaintiffs further object to the Magistrate's gratuitous injection of a *Kodak* cite into that section on page 38 of his report. The cite he uses has nothing to do with the contention attributed to the Plaintiffs that it follows, to wit: "that all a plaintiff need prove is an actual injury by purchasing a tied product." This is particularly objectionable because, even though this Court established *Kodak* as the law of the case and Plaintiffs have endeavored to comply throughout with the *Kodak* standards set forth at length in Plaintiffs numerous briefs and responses, this is the first and only reference to that case anywhere in his Report.

52. Plaintiffs object to the Magistrate's characterization of the Plaintiff UFAA's Response because it fails to discuss evidence presented in support of UFAA's claims. The magistrate ignores the following: evidence of the alleged tying arrangement; evidence of less restrictive means; evidence of economic power over the relevant product market; evidence of Farmers' fraudulent concealment of its policy and the illegality of its tying arrangement; and evidence of the fact of damages. The Magistrate further ignores evidence of Farmers' continuing violation of antitrust law; including but not limited to evidence that those seeking to have systems purchased outside of Farmers have suffered unreasonable delays in Farmers' providing access. (See CF 9, 13, 26, 27, Exh. 114 (see Affidavit of Bogdan Rentea in Support of Plaintiffs Opposition and Responses to Defendants' Motions for Summary Judgment)).

The Magistrate apparently accepts the comments of Plaintiffs' counsel at the December 15, 1993, class certification hearing as admissions that Farmers is no longer tying the purchase of *tied* products to the purchase of the *tying* product. Mr. Rentea's comments at that time were in response to Farmers' mere *announcement* of policy changes. It remained to be seen that the proof would be in the details. Since that time additional discovery has resulted in evidence that: the maintenance service requirements are still a problem in that they remain an unreasonable restraint of trade; the subsequent announcement of AIMS options has been placed in doubt by a recent Farmers Bulletin announcing the withdrawal of one of those options; members of UFAA in particular have been targets of abuse; and those

agents who have obtained systems from outside vendors have suffered unreasonable delays and hardships. (See Exh. B attached hereto, Exh. 2 attached to Plaintiff UFAA's Response to Defendants' Motion for Summary Judgment against UFAA). The Magistrate has further omitted evidence of other pending contract claims in another state.

A.2. OBJECTIONS TO THE MAGISTRATE'S INJUNCTIVE RELIEF ANALYSIS

53. Plaintiffs object to the Magistrate's ignoring *all* of the facts presented by Plaintiff UFAA and the other Plaintiffs and Plaintiff classes. On page 38, the Magistrate states, "Having previously recommended that the District Court find that there is no illegal tie based on the facts presented to it, the undersigned recommends that the District Court also find that there are no facts to support a request for injunctive relief." Having objected *supra* and proven that there is significant evidence to the contrary, Plaintiffs must insist that the analysis be initiated *de novo*, without the Magistrate's foregone conclusion that there is no illegal tie.

54. Plaintiffs object to the Magistrate's conclusion concerning facts presented by Plaintiff in regards to continuing injury and continuing violation claims. On page 38, the Magistrate admits that facts supporting Plaintiff UFAA's position were presented but then states on page 40 that "this Court can find no evidence of any continuing violation or injury." Obviously, the Magistrate's conclusion is based upon his perception of the weight of the evidence. This is contrary to the summary judgment standards that the Magistrate must use in this proceeding. Plaintiffs further object to the manner in which the Magistrate dismisses facts he admits were submitted by Plaintiffs without reference to any contravening or controverting facts or evidence submitted by Defendants. (See the evidence supporting Plaintiffs' Objection No. 52 *supra*).

55. Plaintiffs object to the Magistrate's characterization of Plaintiff UFAA's claim of the harm of forced termination. On page 39, the Magistrate states that he has "heard no evidence and has found no evidence in any of the exhibits than any agent has ever been threatened with termination if they did not buy a computer from

Farmers to access the FANS, nor that any agent would be terminated by Farmers if they took part in this litigation." It is Farmers' contention that Farmers can forcibly terminate any agent at any time for any reason. Plaintiffs have consistently stated that the AAA contract does not allow Farmers to do that. Regardless of the reason Farmers forcibly terminates an agent, he or she will be irreparably harmed. Plaintiff UFAA seeks that this Court declare such actions on the part of Farmers against UFAA members to be in breach of the AAA contract because terminations for failure to buy or use a computer or other reasons related or unrelated to computer use are not among the limited reasons for termination specifically noted in the contract.

56. Plaintiffs object to the Magistrate's acceptance on page 40 of Defendants' claim that the alleged tie cannot reoccur. Both the Magistrate and the Defendants insist upon ignoring that maintenance service is one of the alleged tied products. Evidence demonstrates that Farmers is still requiring the unnecessary purchase of maintenance service for computer systems in order for agents to obtain or continue to achieve electronic access. That is the reason, for instance, that one of the AIMS options was recently withdrawn, which fact is, in itself, evidence that the alleged tie can reoccur without a permanent injunction. (See Exh. B).

57. For all of the above factual reasons and reasons of law, the Plaintiffs object to the Magistrate's conclusion on page 40 that no material or controverted issues of fact exist to prevent summary judgment and his conclusion that declaratory relief is not available because the challenged practice has ceased.

A.3. OBJECTIONS TO THE MAGISTRATE'S DISMISSAL OF CONTRACT ISSUES

58. Plaintiffs object to the Magistrate's conclusion that pendent (supplemental) jurisdiction be declined. Since, for the above-described reasons, there is no reason to grant summary judgment against UFAA, pendant jurisdiction should remain.

VI.

OBJECTIONS TO RECOMMENDATION THAT CLASS ACTIONS BE DISMISSED

59. Plaintiffs object to the Magistrate's conclusions that the liability class should be decertified and that a damage class should not be certified. There is no evidence that justifies reversing Judge Nowlin's Order certifying a liability class. On the issue of a damage class, Judge Nowlin clearly stated in his Order that if liability was found to exist, the Court may then consider certifying a damage class or classes. That time has simply not arrived yet. How could the Plaintiffs designate an expert on the issue of class-wide damages when a damage class has not even been defined? Could there be subclasses? Could there be a limitation on the time frame? These questions at a minimum need to be answered by this Court before a damage analysis can be commissioned.

The Magistrate does not make it clear that the Plaintiffs' Motion to Certify a Damage Class was filed under protest and specifically intended for the purpose of not waiving their right to continue arguing that any determinations relating to the issue of a damage class or damage classes are premature in view of Judge Nowlin's previous order.

Plaintiffs further object to the Magistrate's reliance upon irrelevant evidence to support his decision in regards to class action issues. The evidence the Magistrate describes on pages 41, 42, 43, 44, 45, and 46 is all pertinent to the alleged tie not class certification. Besides, all of that evidence has been neutralized by the Plaintiffs' contravening facts. For instance, take Farmers' statements, starting on page 45, about not requiring the purchase of a computer. The fact is that, until recently, in order for an agent to achieve electronic access, someone had to purchase that access from Farmers, whether that someone was the agent himself, another agent like himself or a district manager, and that someone was contractually required to purchase the computer system he was using to access the mainframe exclusively through Farmers. No exceptions. (See ANSA). So, what does all of this dialogue about tying arrangements have to do with the Magistrate's decision to withdraw class certification under 23(b)(2) and deny class certification under 23(b)(3)? Nothing. All of the

evidence pertinent to the existence of a class and the qualification of this as a class action are in the Plaintiffs' briefs in support of class certification. Judge Nowlin reviewed that evidence and concluded that class certification was proper for the Vinson and Moon liability classes. That evidence remains uncontroverted.

VII.
OBJECTIONS TO ALTERNATIVE SUMMARY JUDGMENT

60. Plaintiffs object to the Magistrate's characterization of Plaintiffs' Response. On page 49, in the section of his report entitled "Plaintiff's Response," the Magistrate mentions only two of the arguments and none of the contravening facts tendered by the Plaintiffs in their response to this motion of the Defendants. There are a number of arguments that the Magistrate does not even mention. Some of them are as follows: First of all, the Magistrate ignores the Plaintiffs' "law-of-the-case" argument, in which the Plaintiffs submit that the statute of limitations arguments of the Defendants, made first in their brief in opposition to Plaintiffs motion to certify classes, have already been rejected by this Court in its Class Certification Order of January 4, 1994. The Plaintiffs supplied adequate case law support of their argument that this issue should not be readdressed by the Magistrate. Second, the Magistrate ignores the case law presented by Plaintiffs concerning the point at which damages are ascertainable. The cases provided described "changes provisions" similar to those in the various contracts at issue in the present case. Third, the Magistrate ignores evidence and argument that the Defendants' policy of misleading agents regarding the use of outside computers and the nature of the tying arrangement comprises fraudulent concealment that automatically tolls the limitations. Additionally, the Magistrate ignores the Plaintiffs' proffered evidence of continuing violation and continuing and accumulating harm: He ignores Farmers continuing denials of upgrades. He ignores Farmers' continued overpricing of systems and peripherals. He ignores Farmers' continuing denial of the use of peripherals purchased outside. He ignores Farmers' continued acceptance and the agents continued payment of installment. He ignores Farmers continued failure to provide specifications for alternative systems. He ignores the monthly access fees required by Farmers for access to FANS to this day. He ignores Farmers'

continued requirements of maintenance service agreements for computer systems and peripherals. He ignores all executory provisions of the various contracts. He ignores Farmers continued requirement of written consent for changes to the equipment and the fact that consent was never given for outside purchases. He ignores evidence of Farmers' unilateral control over changes to the equipment.

61. Plaintiffs object to the Magistrate's statement, in his continuing violation analysis on page 49, that there are only two bases for permitting suit more than four years after a cause of action accrues. This statement ignores most of the alternatives presented in the Plaintiffs' response and described *supra* in Plaintiffs' Objection No. 60. It ignores, for instance, the fact that fraudulent concealment and continuing conspiracy both extend the statute of limitations to the date of ascertainment of the damages or to the date of the discovery of the fraud.

62. Plaintiffs object to the Magistrate's misstatement of the Plaintiffs' assertion regarding Farmers' policy of misleading agents. On page 50, the Magistrate states, "Plaintiffs assert that Defendants' 'policy of misleading agents with respect to access to FANS' was an additional overt act amounting to a continuing violation sufficient to revive the barred causes of action." What the Plaintiffs actually assert is that each misleading statement or act was a continuing violation and that each such act was also in furtherance of Farmers' fraudulent concealment of the true nature of their policy and the true nature of the tying arrangement.

63. Plaintiffs object to the Magistrate's statement, on pages 50 to 51, that Farmers' continuing misleading conduct was "not an injurious act separate from the prior alleged misconduct." This ignores the Plaintiffs' fraudulent concealment argument *supra*, and ignores every incident where purchase outside was denied, or the inferential possibility that requests for outside purchase were not made, based upon previous denials. The Magistrate further ignores the whole period of time in which Farmers' secret policy was that all such requests would be denied regardless of merit. (See CF 9).

64. For all the above reasons, Plaintiffs object to the Magistrate's conclusion that Plaintiffs have failed to show continuing violation.

65. Plaintiffs object to the Magistrate's conclusion without discussion or basis in law that the Plaintiffs' speculative or unprovable damages arguments fail. In reaching that conclusion, the Magistrate discussed no controverting facts and no case law justifying his conclusion.

66. Plaintiffs object to the Magistrate's conclusion that damages were not speculative or unascertainable. Again, the Magistrate reaches this conclusion with out mention of controverting facts or case law justifying his conclusion.

67. Plaintiffs object to the Magistrate's conclusion that class members damages could have been calculated at the time the sales agreement was signed. Again, the Magistrate reaches this conclusion without mention of controverting facts or case law justifying his conclusion and, in the process, he ignores the terms of the ANSA agreement requiring agents receive written permission that Farmers never gave.

68. For all the above reasons, Plaintiffs object to the Magistrate's conclusions in the last paragraph of page 52 that the statute of limitations bars suit by any class members entering into a CISSA with Farmers prior to June 18, 1988 or who decided prior to June 18, 1988 to not enter into a CISSA.

Respectfully submitted,
RENTEA & ASSOCIATES

/s/

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ATTORNEYS FOR PLAINTIFFS

DATED: April 17, 1995

SUPPLEMENTAL APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED FARMERS AGENTS
ASSOCIATION
Plaintiff,

V. A-92-CA-373-JN
CONSOLIDATED WITH
FARMERS INSURANCE EXCHANGE, A-92-CA-374
ET AL.
Defendants

and

THOMAS J. VINSON ET AL. AND
ROBERT D. MOON ET AL.
Plaintiffs

V.

FARMERS INSURANCE EXCHANGE,
ET AL.
Defendants

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LUCIUS D. BUNTON III, SENIOR JUDGE, UNITED STATES DISTRICT COURT

The Magistrate Court submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. §636(b)

and Rule 1(c) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates Judges, as amended, effective February 17, 1995.

This Report and Recommendation covers four (4) separate motions for summary judgment filed by Defendants and one motion filed by Plaintiffs.

The following documents were considered by the Court:

1. Documents related to Defendants' request for summary judgment against Vinson and Moon:

   Defendants' Motion for Summary Judgment against Plaintiffs Vinson and Moon filed November 14, 1994 (Doc. #204); Defendants' Memorandum of Law in Support of Summary Judgment against Plaintiffs Vinson and Moon filed November 14, 1994 (Doc. #205); Defendants' Exhibits filed November 14, 1994 (Docs. #212-213); Plaintiffs Vinson and Moon's Response to Defendants' Motion for Summary Judgment filed December 1, 1994 (Doc. #225); and Defendants' Reply to Plaintiffs Vinson and Moon's Response filed December 16, 1994.

2. Documents related to Defendants' request for summary judgment against United Farmers Agents Association, Inc.:

   Defendants' Motion for Summary Judgment against Plaintiff United Farmers Agents filed November 14, 1994 (Doc. #210); Defendants' Memorandum in Support of Summary Judgment against Plaintiff United Farmers Agents filed November 14, 1994 (Doc. #211); Defendants' Exhibits filed November 14, 1994 (Docs. #212-213); Plaintiffs' Response to Defendants' Motion for Summary Judgment filed December 1, 1994; and Defendants' Supplemental Memorandum in Support of Summary Judgment filed January 6, 1994 (Doc. #236).

3. Documents related to Defendants' request for dismissal of class certification under Fed. R. Civ. P. 23(b)(2):

Motion by Defendants to Dismiss as a Class Action and Deny Certification filed November 14, 1994 (Doc. #206); Memorandum in Support of Motion by Defendants to Dismiss as a Class Action and to Deny Certification filed November 14, 1994 (Doc. #207); Defendants' Exhibits filed November 14, 1994 (Docs. #212-213); Plaintiffs' Response to Defendants' Motion to Dismiss as a Class Action and Deny Certification filed December 1, 1994 (Doc. # 226); and Defendants' Reply to Plaintiffs' Response filed December 16, 1994 (Doc. #233).

4. Documents related to Plaintiffs' request for class certification under Fed. R. Civ. P. 23(b)(3):

Motion by Plaintiffs Vinson and Moon to Certify a Plaintiffs Class under Fed. R. Civ. P. 23(b)(3) filed November 14, 1994 (Doc. #203) and Defendants' Response to Plaintiffs Vinson and Moon's Motion to Certify a Plaintiffs Class filed November 28, 1994 (Doc. #224).

5. Documents related to Defendants' request for partial summary judgment against Vinson and Moon based on the statute of limitations:

Defendants' Motion for Summary Judgment against Plaintiffs Vinson and Moon on Claims Barred by the Statute of Limitations filed November 14, 1994 (Doc. #208); Defendants' Memorandum of Law in Support of Summary Judgment against Plaintiffs Vinson and Moon on Claims Barred by the Statute of Limitations (Doc. #209); Defendants' Exhibits filed November 14, 1994 (Docs. #212-213); Plaintiffs' Response filed December 1, 1995 (Doc. #227); and Defendants' Reply to Plaintiffs Vinson and Moon's Response filed December 16, 1994 (Doc. #232).

The Court additionally reviewed all of the exhibits proffered by the parties as well as reviewed the entire case file, including pleadings and previous orders issued by United States District Judge James R. Nowlin.

I.
PLAINTIFFS' ALLEGATIONS

A. Plaintiffs Vinson and Moon.

Plaintiffs, Thomas J. Vinson and Robert D. Moon, filed a First Amended Original Complaint (Doc. #13) on September 15, 1992, seeking to recover treble damages under section four of the Clayton Act (15 U.S.C. § 15) for the named Plaintiffs, as well as all others similarly situated, and also seeking injunctive relief under section sixteen of the Clayton Act (15 U.S.C. § 26) as a direct result of alleged violations by the Defendants (Farmers) of section one of the Sherman Act (15 U.S.C § 1) and section three of the Clayton Act (15 U.S.C. § 14).

Thomas J. Vinson is a Farmers Insurance agent who entered into a Computer Installment Sales and Security Agreement and an Agency Network Service Agreement with Farmers. Robert D. Moon is a Farmers Insurance agent who did not enter into a Computer Installment Sales and Security Agreement nor an Agency Network Service Agreement with Farmers. The two Plaintiffs allege that they unwillingly entered into a conspiracy with Farmers and with other conspirators unnamed and with the Farmers Insurance district managers, the Farmers Insurance division agency managers, Farmers Insurance regional managers, Farmers Insurance regional agency managers, and Farmers Insurance regional sales managers and International Business Machines (IBM) to violate the Plaintiffs' rights as listed above.

Both Vinson and Moon bring class actions requesting relief for all persons similarly situated as the Plaintiffs: In Plaintiff Vinson's case, all those who entered into Computer Installment Sales and Security Agreements with Farmers Insurance and in Plaintiff Moon's case, all those who did not. Plaintiffs allege that Farmers has

developed and maintains a vast amount of ratings, marketing, and policyholder information, most of which is not readily available except when an agent is online with the Farmers agency network system, which is a computer mainframe located in Los Angeles, California (¶ 19 of the Vinson and Moon First Amended Complaint).

The Plaintiffs allege that Farmers, beginning in 1981 and continuing, is restraining trade and commerce by conditioning access to the Farmers agency network systems (FANS) on the purchase directly and only from Farmers of IBM computer equipment at prices and conditions solely dictated by Farmers. They also allege that it is technically possible to obtain access to the FANS through other types of computer equipment. Plaintiffs allege that access to FANS greatly enhances the ability and efficiency of agents and therefore the profitability of agents. Plaintiffs allege coercion in the requirement to purchase the IBM computer systems and IBM service contracts to obtain access to FANS and the attempted coercion of those without computer access to obtain computer access through Farmers. Plaintiffs also allege that the conspiracy was furthered by the requirement to execute the Computer Installment Sales and Security Agreement and the requirement to execute an Agency Network Service Agreement and to pay a monthly computer service fee in order to have access to FANS.

Plaintiff Vinson alleges on behalf of his class that the class members were coerced into the purchase of the IBM computer system through threats of termination of their Agency Appointment Agreements (¶ 31 of First Amended Complaint). Plaintiff Moon alleges for his class that there was coercion by the Defendants in an attempt to force the class members to purchase a computer system which they do not desire to purchase.

Plaintiffs allege that the conduct of the Defendants requiring a Computer Installment Sales Agreement and an Agency Network Service Agreement to obtain access to FANS is an illegal tying agreement under section three of the Clayton Act (15 U.S.C. § 14)(Vinson and Moon First Amended Complaint ¶ 34). The two Plaintiffs seek monetary damages for their respective classes in the amount of one hundred million dollars ($100,000,000) each. They

also request temporary and permanent injunctions enjoining Farmers and the other co-conspirators from requiring the purchase of IBM computer equipment from Farmers in order to have access to FANS and for attorneys fees.

B. Plaintiff United Farmers Agents Association.

Plaintiff United Farmers Agents Association, Inc. (UFAA) also brings a complaint [consolidated with the Vinson/Moon complaint] against the same Defendants seeking a declaratory judgment concerning the rights of Plaintiff UFAA's members under the standardized agent appointment agreement entered into between each agent and Farmers. (UFAA Second Amended Original Complaint, Doc. #162). The UFAA Complaint alleges that Farmers has violated section one of the Sherman Act (15 U.S.C § 1) in that it has coerced and attempted to coerce the Plaintiff UFAA's members into purchasing IBM computer equipment from Farmers in order to access the Farmers Agency Network System (FANS). Plaintiff UFAA alleges that the requirement to purchase the computer equipment from Farmers/IBM and thereby obtain access and use of the FANS is an illegal tying arrangement. UFAA also alleges that Farmers has committed a violation of section three of the Clayton Act (15 U.S.C. § 14) in that the Computer Installment Sales Agreement and the Agency Network Service Agreement which UFAA members who purchase equipment from Farmers are forced to enter into is also an illegal tying arrangement in restraint of trade and commerce.

UFAA makes a number of supplemental claims, one of which is that Farmers has threatened and is threatening to terminate the Agency Appointment Agreement of all agents who do not purchase computer equipment from Farmers. Additionally, UFAA contends that Farmers is attempting to establish and enforce production standards and levels which are not part of the agency agreement and which are "virtually impossible to satisfy unless the agent has access to the agency network system." UFAA further contends that access to FANS is only possible through the acquisition of IBM computer equipment purchased from Farmers. UFAA also complains about an alleged unilateral amendment of the Agency Appointment Agreement because Farmers adopted in January of 1992 "deteriorating agency

rehabilitation guidelines" and implemented a "program of limited underwriting authority."

UFAA alleges that the Farmers' requirements that the Plaintiff's members purchase computer equipment to obtain access to FANS constitutes a breach of the covenant of good faith and fair dealing with respect to the Agency Appointment Agreement. UFAA also sues for declaratory judgment and injunctions as well as a declaration by the Court that the conduct of Farmers violates the covenant of good faith and fair dealing and for attorneys' fees.

II.
BACKGROUND

Farmers Insurance is a group of five insurance companies selling various lines of insurance policies, including life, homeowners, automobile, and commercial liability policies. Farmers has approximately 14,000 independent contractor agents operating in twenty-nine states. See Defense Exhibit 2 (Braddock affidavit ¶ 4). The basic contract defining the rights and obligations between Farmers and its agents is the Agent Appointment Agreement. Farmers is obligated under the Appointment Agreement to provide policyholder information to its agents. See Defense Exhibit 1 (Butler affidavit, Agent Appointment Agreement of Thomas Vinson).

In 1981, Farmers began the process of creating a dual system of records for its policyholder information. Paper and manual records were converted to computer records and agents (through the use of dumb terminals) were permitted online access to policies and rating information contained in what is now called the Farmers Agency Network System (FANS). The information available online from FANS was then and still is also available on paper through written manuals, publications, and policy records. See Plaintiffs' Exhibit 114 (Walker affidavit ¶ 13); see also Defense Exhibit 1 (Butler affidavit ¶ 5); Defense Exhibit 2 (Braddock affidavit ¶ 9).

Beginning in 1985, when an agent accessed FANS, he was able to make changes in certain policyholder data contained in FANS. Over the years, additional services have been added to FANS.

Despite the growth of information and services available via FANS, the agents have always had the ability to access the same information via the telephone, fax machine, and mail without the necessity of computer linkage. See Defense Exhibit 2 (Braddock affidavit). Obviously, by using a computer, an agent gains speed of access to policyholder information.

If the agent desired electronic access to the FANS, he was required to accomplish that access on an IBM computer specially configured for the FANS. See Defense Exhibit 2 (Braddock affidavit). An agent was not prohibited from using another agent's computer to access the electronic information if he chose not to purchase his own computer from Farmers.

Thousands of Farmers agents have not purchased an IBM computer from Farmers. Farmers does not require that its agents purchase a computer from Farmers to have access to policyholder information. However, until 1993, the only approved online access to the policyholder information was via a specially configured IBM System purchased from Farmers. See Defense Exhibit 3 (Wong affidavit). Agents are now permitted to purchase outside third-party vendor computers to access FANS.

To encourage the agents to use FANS, Farmers offers a small payment (presently 40 cents) to each agent for each time the agent electronically accesses policyholder information on the FANS. See Defense Exhibit 3 (Wong affidavit). It is not necessary that the agent own the computer to receive this payment, only that he input his agent identification number when using an authorized computer. Approximately half of the 14,000 Farmers agents have purchased or leased IBM computers from Farmers. Over ninety percent (90%) of Farmers agents have electronic direct access to the FANS through either their own computers or computers belonging to other agents. As such, ninety percent of Farmers agents have at some time received the small bonus payment for accessing policyholder information on FANS. See Defense Exhibit 3 (Wong affidavit); Defense Exhibit 4 (Larsen affidavit).

Electronic access to the policyholder information in Farmers

is not sold to any outside individual or firm: it is only offered to Farmers agents. Only Farmers agents and employees can access FANS. Farmers agents do not pay for access to the policyholder information but must use an approved computer to electronically access the policyholder information.

Plaintiff Vinson purchased his first IBM computer from Farmers in 1983 or 1984 and upgraded to a different system in December, 1987. (Vinson deposition p. 84-85, 225). Plaintiff Moon has never purchased an IBM computer from Farmers. Plaintiff Moon has used a personal computer in his agency since 1986. (Moon deposition p. 59-61).

III.
PROCEDURAL HISTORY

On June 18, 1992, two cases were filed, one by Vinson and Moon, the other by United Farmers Agents Association (UFAA). The cases were consolidated on June 30, 1992 by order of United States District Judge James R. Nowlin. After proceeding in discovery for an extended period of time, a hearing was held on December 15, 1993 before United States District Judge James R. Nowlin on all the Plaintiffs' Motion to Certify the Action as a Class Action. Subsequent to that hearing, on January 4, 1994, Judge Nowlin entered an order granting in part and denying in part Plaintiffs' motion (Doc. #115). The order discusses the evidence presented and the applicable requirements of Fed. R. Civ. P. 23. Its operative language states at page 7:

> This Court finds that a class action should be certified as a plaintiff class under Rule 23(b)(1). The certified class is composed of all the individual persons who were independent insurance agents for Farmers Companies during the time period in which the alleged illegal tying practice occurred for the process of determining whether there was an illegal tying arrangement. This Court may modify this class into subclasses with respect to the possible Moon class and the possible Vinson class, but this Court declines to certify such classes at this time. This Court's

initial concern is whether or not the alleged conduct of the defendants was in violation of any law. If any such violation is shown to have occurred, then this Court may certify a class or classes with respect to damages under subdivision (b)(3) . . . page 7.

The Court continues at page 9: This Court may modify this class as circumstances warrant.

On January 13, 1995, this consolidated action was transferred to the trial docket of the Honorable Lucius D. Bunton III and the referral of pending and future discovery motions as well as other dispositive and non-dispositive motions to the undersigned was continued.

IV.
DISCUSSION

A. Standard of Review under Fed. R. Civ. P. 56(c).

Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show the moving party to be entitled to summary judgment as a matter of law." Rule 56(e) states: "When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing there is a genuine issue for trial."

Both movants and non-movants bear burdens of proof in the summary judgment process. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). The movant with the burden of proof at trial must establish every essential element of its claim or affirmative defense; however, if the issue is one on which the movant does not bear the burden of proof at trial, summary judgment is warranted if the non-movant fails to make a sufficient showing to establish the existence of each element essential to its case. Id. at 322-23, 106 S.Ct. at 2552. In so doing, the moving party without the burden of

proof need only point to the absence of evidence on an essential element of the non-movant's claims or affirmative defenses. Celotex, 477 U.S. at 323-24, 106 S.Ct. at 2554. At that point, the burden shifts to the non-moving party to produce evidence in support of its claims or affirmative defenses by affidavits or by "depositions, answers to interrogatories and admissions on file, designating specific facts showing that there is a genuine issue for trial." Id. at 324, 106 S.Ct. at 2553. The non-moving party must produce "specific facts" showing a genuine issue for trial, not mere general allegations. Fed. R. Civ. P. 56(e); Tubacex v. M/V Risan, 45 F.3d 951, 954 (5th Cir. 1995). The non-movant has failed to meet this standard if its response merely shows that "there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). If no such evidence is produced, "[t]he moving party is entitled to a judgment as a matter of law.'" Id. at 323, 106 S.Ct. at 2552.

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. Burgos v. Southwestern Bell Telephone Co., 20 F.3d 633, 635 (5th Cir. 1994); Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1263 (5th Cir. 1991), cert. denied, 112 S.Ct. 936 (1992).

The Court must substantively evaluate the evidence offered by the moving and non-moving parties to determine whether the evidence raises a "material" fact question which is "genuine." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2510 (1986). A fact question is "material" if it involves "disputes over facts that might effect the outcome of the suit under the governing law." Id. at 248, 106 S.Ct. at 2510; Burgos, 20 F.3d at 635.

The material fact dispute must be such that a reasonable jury could return a verdict for the nonmoving party. Liberty Lobby, 477 U.S. at 106 S.Ct. at 2510. The Fifth Circuit has concluded "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the evidence

before the court." Ja[illegible] v. Sadler, 909 F.2d 834, 837 (5th Cir. 1990) (citing Matsush[illegible] 75 U.S. at 586, 106 S.Ct. at 1356). To the extent facts are undisputed, a Court may resolve the case as a matter of law. Blackwell v. Barton, 34 F.3d 298, 301 (5th Cir. 1994).

B. Summary judgment against Vinson and Moon.

1. Defendants' allegations.

The Defendants allege primarily that Farmers has not imposed a "tying arrangement" on its agents. This general allegation is divided into a number of specific allegations which will be reviewed in turn: 1) Farmers has not sold two separate products pursuant to a tying arrangement; 2) Farmers has not forced its agents to purchase computer equipment to access its policy information; 3) Farmers does not possess sufficient economic power to compel the purchase of any alleged tied product; 4) there has not been nor could there be any anti-competitive effect in the alleged tied product market; 5) Plaintiffs have not suffered any antitrust injury; and 6) there is no genuine issue of material fact as to the Plaintiffs' conspiracy allegations.

Defendants assert that in order to establish a tying relationship and therefore a tying violation, Plaintiffs must show that two separate products were tied together by Farmers and that Plaintiffs were forced or coerced to buy the alleged tied product when they did not wish to do so. Absent two separate products, there cannot be a tying violation. The Defendants allege that the Plaintiffs contend that electronic access to Farmers' policy information is the "tying" product and the requirement that certain IBM computer products be purchased in order to have electronic access is the "tied" product. Thus, Defendant contend that the Plaintiffs lose at the initial definitional stage in that electronic access to Farmers policy information is by definition not a product. Defendants point out that has never been an opportunity for any person or agent of Farmers to buy or offer to buy access to Farmers' policyholder information and that there is no evidence Farmers ever sold or offered to sell access to its policyholder information. The Defendants assert that access to the policyholder information is a contractual obligation provided by Farmers to its agents pursuant to the Agency Appointment Agreement

and that said access is provided to the agents at no charge and no price. Therefore, there is no "product" in electronic access to the Farmers policyholder information and no antitrust violation.

Farmers alleges that there has been no evidence produced to support Plaintiffs' allegations in paragraphs twenty, twenty-nine and thirty-two of Vinson and Moon's First Amended Original Complaint that Plaintiffs were forced and coerced to purchase electronic equipment from Farmers in order to gain access to policyholder information. Farmers contends that the evidence produced to support this motion indicates that no agent has ever been forced to purchase any computer equipment, much less Farmers computer equipment, in order to access policyholder information: the purchase of Farmers computer equipment was required only if the agent wished to have electronic access to Farmers policyholder information and was unable to share another agent's computer.

Farmers also contends that, even assuming the policyholder information provided by Farmers to its agents pursuant to the agency appointment agreement is a product, Plaintiffs must show that Farmers possesses market power sufficient to force the Plaintiffs to make a buying decision against their will. The focus of a tying violation is that the seller of a product attempts to transfer economic power from one product to another: because the seller has economic power in the market for the tying product, it can force the purchaser to purchase an unwanted tied product in order to obtain the desired product. If the seller lacks power in the tying product market to produce a restraint in the second "tied" market, there can be no tie and hence no violation of the antitrust laws.

Because one of the primary questions is whether the illegal tie transfers power from the first market to foreclose competition in the second market, Farmers alleges that the Plaintiffs must show an anti-competitive effect in the second market for the tied product. Farmers asserts that because there is no anti-competitive effect in the second tied market, Farmers did not violate antitrust laws.

Farmers alleges that because it has no interest in the computer equipment market and, even if it did, Farmers was not a competitive

factor in that market, the Plaintiffs cannot show any anti-competitive effect or resulting damage. Farmers points out that under section four of the Clayton Act (15 U.S.C § 15) a plaintiff must prove "fact of damage" or "proof of impact" as an essential element of their case or their claims necessarily fail.

Finally, Farmers alleges that there has been no showing of any facts to support the allegations in paragraphs seventeen of the First Amended Original Complaint of Vinson and Moon that the Farmers companies and others were involved in a conspiracy. Further, Plaintiffs have engaged in no discovery in that area.

2. Plaintiffs' response.

Plaintiffs respond that electronic access to the policyholder information owned by Farmers is indispensable for the operation of an insurance agency and that there can be no dispute that the computer equipment is a product separate from the electronic database. Because Farmers only offered one form of access to its electronic database until recently, and because that one method of access is conditioned on the purchase of a computer, Plaintiffs claim that electronic access to the policyholder information is a tied product and therefore violative of the Clayton Act.

Plaintiffs allege that Farmers unilaterally controls online access to its policyholder information by requiring every agent who requests such access to enter into a written agreement concerning the purchase of a specific IBM computer and service; therefore electronic access is tied to the purchase of the computers. The Plaintiffs continue that Farmers has misconstrued the market where Farmers has absolute power and that the market which this Court should review is "electronic access" to Farmers insurance policies and services. Plaintiffs assert that there is ample evidence to show Farmers possesses market power in the relevant market, which is the online access; therefore, the element of anti-competitive effect is also proved.

Plaintiffs also contend that damage evidence has been presented in the affidavits of Vinson and Moon on behalf of their

respective classes. They assert for the Vinson class that products were available on the open market at substantially lower prices than those Farmers required them to purchase. Further, they allege that substantial profits were lost by the Moon class because the members did not have electronic access to the policyholder information.

Plaintiffs have listed themselves as co-conspirators in their First Amended Complaint and therefore they contend that evidence has been presented with regard to the conspiracy between the Farmers insurance companies and the Plaintiffs sufficient to survive summary judgment.

3. Analysis

On December 15, 1993, in an appearance before United States District Judge James R. Nowlin in oral arguments at a class certification hearing, an attorney for the Plaintiffs stated the following:

> Briefly, your Honor, Farmers agents need a variety of information or data to — before and after they sell insurance policies. And unquestionably, this information or data is vital to them performing their duties as agents.
>
> Currently, this data is provided by Defendant Farmers in two separate ways, one that we're complaining about and one that we're not complaining about. The one that we're not complaining about is the written data that they provide by way of bulletins, publications, manuals and so forth that contain various information necessary for them to do their job, for example, rating information, policyholder information, and the like.
>
> Although there's some references in the record with regard to how easy it is to use this information or difficult to use this information, we're

not complaining about that portion of the data.

> What we're complaining about is the other manner in which the data is provided by Farmers. And that is through online access to the mainframe which is located in Los Angeles, California, at the headquarters of the Defendants.
>
> In that mainframe resides all the data that is also available in the written form. But, of course, it's much easier to access. It's a lot . . . it's updated a lot quicker and a lot faster, but it can only be accessed by going online with the mainframe. (Defendants' Exhibit 15, excerpts of trial transcript, p. 2 beginning at line 23-p. 3 line 22).[2]

Following the admonitions of the United States Supreme Court in Anderson, 477 U.S. at 247-48, 106 S.Ct. at 2510, this Court must evaluate the evidence offered by the moving and non-moving parties to determine whether the evidence raises a "material" fact questions which is "genuine." The statement by the Plaintiffs' attorney at the class certification hearing at least articulates to this Court in a very shorthand fashion what this lawsuit is about. The Court discusses the Defendants' Motion for Summary Judgment against Vinson and Moon in the areas as set out in the Defendants' Motion as follows:

a. Electronic access is not a "product."

Farmers contends that it has not sold two separate products pursuant to a tying agreement. Every agent who is authorized to sell insurance products provided by Farmers signs an Agency Appointment Agreement. See Defense Exhibit 1 (Butler affidavit, ¶ 12, affidavit exhibit "D", Appointment Agreement of Thomas Vinson). At paragraph (3) of this Agency Appointment Agreement,

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[2] All references are to exhibits attached to motions for summary judgment or responses thereto and are identified by exhibit number and party submitting same.

Farmers is required to provide to the agent "company manuals, forms, and policyholder records necessary to carry out the provisions of this agreement." All agents have access to this policyholder information. Farmers provides access in two forms, manually and through electronic access. See Defense Exhibit 2 (Braddock affidavit ¶ 9).

Prior to 1981, all access was manual. In 1981, Farmers developed the FANS. At its inception FANS simply provided information; however, since that time, the system has been upgraded to provide access to files and rate-quoting data and the ability to modify the policies themselves. See Defense Exhibits 1, 2, and 3 (Butler, Braddock, and Wong affidavits). Plaintiffs in their response do not dispute that the information is available manually as well as electronically. See Plaintiffs' Exhibit 114 (Walker affidavit, ¶ 14).

Farmers contends that the electronic access to its policyholder information is not a "product." The issue is whether Farmers sold two separate products. Plaintiffs have made clear in their claims and allegations that they are complaining of the alleged tie only as regarding the electronic access to the information contained in FANS. There is no dispute that agents have other methods than buying a Farmers computer to obtain access to the information contained in FANS: each agent receives manuals and pamphlets, and the agents can also access the information by phone, facsimile, and the mail, and they can obtain electronic access through other agents' computers.

Prima facially, to have a tie there must be two separate products. Jefferson Parish discusses this requirement in great detail: "Not every refusal to sell two products separately can be said to restrain competition." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 11-12, 104 S.Ct. 1551, 1558 (1984). In addition, "not all tying arrangements are illegal." Breaux Bros. Farms, Inc. v. Teche Sugar Co., 21 F.3d 83, 86 (5th Cir.) cert. denied, - U.S. -, 115 S.Ct. 425 (1994).

The undersigned feels that the Plaintiffs have presented no evidence to establish that electronic access to the policyholder information in the Farmers mainframe computer is a product. This

policyholder information is not sold on the open market, is not sold to consumers in any form or fashion, and is provided only to the independent contractors who choose to become Farmers agents by signing an Agency Appointment Agreement. See Defense Exhibit 2 (Braddock affidavit ¶ 9).

The Plaintiffs have attempted to establish that electronic access is itself a product. Electronic access in and of itself does little good to a Farmers agent or anyone else unless something is obtained through that electronic access. The product that is important to the Farmers agents (Plaintiffs) is the information contained in the mainframe computer in California or in the manuals and files provided by Defendant Farmers. There is no open market for the policyholder information and in reality, as pointed out by the Plaintiffs in argument at prior hearings and in depositions, release by Farmers of information contained in the policyholder files would violate a number of privileges owned by the clients themselves. There is no evidence before this Court to show that there is any tying arrangement instituted by Farmers other than the requirement that an agent sign an Agency Appointment Agreement in order to obtain policyholder information. The record is replete with evidence that Farmers Insurance sells insurance, not online computer services, not computers. See Defense Exhibit 2 (Braddock affidavit); Defense Exhibit 3 (Wong affidavit); Defense Exhibit 7 (Weinstein affidavit); and Defense Exhibit 8 (Expert report of Roy Weinstein).

The record before this Court establishes that, in 1981, Farmers began the process of creating a dual system of records. Paper and manual records were converted into computer records and limited access to those computer records was allowed by agents using dumb terminals to access information regarding policyholders and rating information. That information was, and still is, available through written manuals and publications. Thus, from 1981 to the present, agents have always had the ability to access the policyholder information through manuals, phones, fax machines, and mail without the necessity of the use of any computer whatsoever.

Alternatively, agents have the option of accessing the policyholder information through computers, whether by using

another agent's computer or by purchasing a computer, under certain guidelines, which has the ability to access the Farmers mainframe. By using a computer, a Farmers agent gains only speed of access to the policyholder information. See Defense Exhibit 1 (Butler affidavit); Defense Exhibit 2 (Braddock affidavit); and Defense Exhibit 3 (Wong affidavit).

Plaintiffs allege that the electronic access was sold as one product tied to the purchase of IBM computers from Farmers. Electronic access to the policyholder information in Farmers is a "product" not sold to any outside individual or firm, it is only offered to Farmers agents. That access, if indeed it is a product as alleged by Plaintiff, is obtainable only by Farmers agents. Farmers agents never paid for the policyholder information obtained manually or electronically. See Defense Exhibit 2 (Braddock affidavit). For all these reasons, electronic access to the information contained in FANS is not a "product" capable of tying IBM computers, and there is no antitrust violation.

b. The agents are not consumers.

Assuming for purposes of this recommendation that the electronic access is a product, it then becomes necessary to decide whether the agents are consumers. The antitrust laws were structured to protect competition, not competitors and to protect the ultimate consumers. Jefferson Parish, 466 U.S at 8, 104 S.Ct. at 1556, Breaux Bros., 21 F.3d at 8-89; Roy B. Taylor Sales v. Hollymatic Corp., 28 F.3d 1379, 1382 (5th Cir. 1994).

Plaintiffs allege that they are consumers of the product of electronic access, but they can only become consumers of that product if they choose of their own volition to become Farmers agents. They must choose to become Farmers agents as opposed to agents of any other insurance company in order to obtain policyholder information from Farmers, in manual or electronic form. No facts presented by either Plaintiffs or Defendants show an outside demand for electronic access. There is no separate product market for electronic access to Farmers policyholder information.

c. Farmers has not forced its agents to purchase computer equipment to access its policy information.

In order for an illegal tie to take place, the defendants must use their power to force and coerce the plaintiffs into purchasing an unwanted product in order to obtain a wanted product. No evidence has been shown in any of the affidavits submitted by the Plaintiffs or the Defendants, including the affidavits of Moon and Vinson, that any Farmers agent was required to purchase equipment from Farmers. See Defense Exhibit 4 (Larsen affidavit, ¶¶ 24-27); Defense Exhibit 14 (Lewis deposition); Defense Exhibit 9 (Walker deposition p. 78); Defense Exhibit 1 (Butler affidavit).

Specifically, Plaintiff Moon testified in deposition that he was not threatened with termination for not purchasing a computer from Farmers and that he knew of no other agent who had been terminated for not purchasing a computer from Farmers. See Defense Exhibit 11 (Moon deposition p. 127 l. 10 - p. 128 l. 24). Plaintiff Vinson testified in deposition that he was encouraged by Farmers to purchase a computer from Farmers "to be a good professional agent" but he was not told that he would be fired if he did not purchase one. See Defense Exhibit 10 (Vinson deposition, p. 115 l. 11 - p. 116 l. 16).

There are approximately 14,000 Farmers agents now doing business in twenty-nine states. Prior to June 18, 1988, 4,769 agents had purchased computer equipment from Farmers and 3,881 agents had not purchased computers from Farmers. See Defense Exhibit 1 (Butler affidavit). Currently, 11,400 agents have computer access to Farmers files but only 8,120 have purchased computer equipment. Of the approximately 14,000 Farmers agents nationwide, 13,223 have accessed the FANS either through their own computers or through the computers of other agents. See Defense Exhibit 3 (Wong affidavit).

There is no doubt from review of the entire record that Farmers encouraged its agents to have electronic access to its policyholder information through publications, meetings, requests, letters, and advice. This encouragement also took the form of paying agents a supplement of 40 cents for each time they were registered as accessing the mainframe computer. (See Wong affidavit).

The Fifth Circuit requires that a plaintiff in a tying case show that the purchaser was actually coerced into purchasing an unwanted product. Response of Carolina, Inc. v. Leasco Response Inc., 537 F.2d 1307, 1327 (5th Cir. 1976).

> Actual coercion is an indispensable element of a tie-in charge. A manufacturer may use strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce his retailer to buy its full line of products. An antitrust violation occurs only if it goes beyond persuasion and coerces or forces its customer to buy the tied product in order to obtain the tying product.

Bob Maxwell, Inc. v. American Motors Corp., 637 F.2d 1033, 1037 (5th Cir.) cert. denied, 454 U.S. 860 (1981).

An expert hired by Plaintiffs, John Walker, agrees with the Fifth Circuit in this regard. In his expert's report he states that ". . . electronic access is not required in order to operate an agency profitably and generate earnings commensurate with the agent's alternatives." See Defense Exhibit 5 (¶ 14). No evidence has been presented to show that Farmers coerced or forced Plaintiffs to obtain Farmers' computers.

d. Farmers does not possess sufficient economic power to compel the purchase of an alleged tied product.

In their Motion for Summary Judgment, Defendants indicate that not only is the electronic access not a product, but even if it was a product, Farmers would not have the requisite economic power in that area to violate antitrust laws. There is no evidence to support any proposition that Farmers has sufficient market power in the insurance sales industry to give rise to a violation of antitrust law. Farmers' share in any geographic area within which it operates is insignificant. Farmers has no power in the insurance sales market to force its agents to remain Farmers agents. Farmers only has the complete power to control access to its own policyholder information. See Defense Exhibit 7 (Feinstein affidavit) and Defense Exhibit 8

(Feinstein expert report)

As stated previously the Agency Appointment Agreement obligates Farmers to provide policyholder information to its agents. The agents have numerous ways to access this desired policyholder information in lieu of electronic access to the FANS. See Defense Exhibit 9 (Walker deposition, pp. 93-94). The access to the FANS has been increased in 1994, subsequent to the filing of this suit, to provide at least six different options for agents to access the FANS. See Defense Exhibit 19 (Agency Information Manual Systems Manual).

Defendants contend that one of the evils protected in the antitrust laws is the leveraging of control of one market to increase control of another market. Even assuming as alleged by Plaintiffs that electronic access to the FANS is a product, the marketshare for the tied product, IBM-designed computer equipment specifically configured to access FANS, is so small as to have no effect on competition in the computer sales market. Therefore, there can be no illegal tying arrangement. See Jefferson Parish, 466 U.S. at 16, 104 S.Ct. at 1560; Breaux Bros., 21 F.3d at 87-89. Judge Higgenbotham recently stated "when a party has no control over a tied market, the dangers usually created by a tying arrangement do not exist." Breaux Bros., 21 F.3d at 89. There has been no, nor could there be any, anti-competitive effect in the alleged "tied" product market. Farmers has no economic interest in a market for computer equipment. There is no evidence to support any allegation that Farmers is a factor in the market of computers, even of the type and variety specifically required to access FANS, which is the IBM System 36. See Defense Exhibit 8 (Weinstein expert report ¶ 22).

Citing an example used in the Weinstein expert report, in the year 1990, ten million (10,000,000) units of personal computers were shipped in the United States, IBM shipped two hundred and fifty thousand (250,000) System 36 computers in August of 1990, and Farmers purchased approximately 500 System 36 computers per year from IBM in the early 1990s. The requirement by Farmers to purchase a System 36 IBM computer for access to its FANS had minimal effect on any computer equipment market in the United

States. See Defense Exhibit 8.

e. Plaintiffs have not suffered "antitrust injury."

As part of the private right of action under section four of the Clayton Act, a plaintiff must prove "fact of damage" or "proof of impact." Fact of damage consists of two elements: injury to the plaintiff and causation attributable to the antitrust violation. Nichols v. Mobile Bd. of Realtors, 675 F.2d 671, 676 (5th Cir. 1982). The Plaintiffs have not designated an expert on damages and the deadline for such designation pursuant to the scheduling order has passed. The Plaintiffs have failed to adduce any evidence that there was comparable equipment available at lower prices which could have been purchased by members of the proposed Vinson class. See Defense Exhibit 9 (Walker deposition); Defense Exhibit 20 (Dowden deposition); and Defense Exhibit 21 (Lubniewski Deposition).

As for the Moon class, there has been no evidence of any adverse financial impact on any Moon class member because of the member's determination not to purchase computer equipment. Plaintiffs must prove an injury flowing from the Defendants' illegal acts. If there is no antitrust injury, there is no violation of the antitrust laws. Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110, 107 S.Ct. 484, 489 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 97 S.Ct. 690, 697 (1977).

For the Vinson class, Plaintiffs' basic allegation is that there was equipment on the open market which would have performed the same function as the Farmers required equipment but which cost less than the Farmers equipment. Other than this bald allegation, Plaintiffs have presented no evidence with respect to the cost of alternative computer choices. See Defense Exhibit 23 (Vinson and Moon responses to first set of interrogatories number 6); Defense Exhibit 10 (Vinson deposition); Defense Exhibit 11 (Moon deposition); and Defense Exhibit 22 (Lively deposition).

Even Plaintiffs' experts provided no facts with regard to specific types or names of computers, or the price thereof, which would have been available for any of the years at question in this

lawsuit. See Defense Exhibit 9 (Walker deposition); Defense Exhibit 20 (Dowden deposition); and Defense Exhibit 21 (Lubniewski deposition).

The Moon class plaintiffs were the agents who decided not to purchase computer equipment from Farmers. In the First Amended Complaint by Vinson and Moon at paragraph 37, the Moon class alleges that they were "injured and damaged in their business in a substantial amount." In response to Farmers interrogatories, the Plaintiffs stated that the damages would be in the form of lost commissions and lost profits. See Defense Exhibit 23 (Responses to Defendants' First Set of Interrogatories number 3). There has been no evidence of any lost profits or lost commissions. Neither the Plaintiffs affidavits nor the affidavits of their designated experts presents any evidence with respect to specific damages suffered by the Plaintiffs as a result of the alleged purchase requirement.

f. There is no genuine issue of material fact with respect to Plaintiffs' conspiracy allegations.

Plaintiffs allege in their First Amended Complaint ¶ 17 that there are five separate companies involved in issuing various types of insurance who are collectively known as "Farmers." The Plaintiffs have alleged that these five companies combined, contracted, and conspired with each other and with all other co-conspirators to restrain interstate trade and commerce. Plaintiffs have alleged in their response to the motion for summary judgment that they themselves were also joint co-conspirators in this conspiracy to violate the antitrust laws.

In light of Copperweld Corp v. Independence Tupe Corp., 467 U.S. 752, 772, 104 S.Ct. 2731, 2741-42 (1984) and Plueckhahn v. Farmers Insurance Exchange, 749 F.2d 241, 245 (5th Cir.), cert. denied 473 U.S. 905 (1985), an allegation of participation in a conspiracy by a plaintiff or among subsidiaries is insufficient by itself to establish that a conspiracy existed. There has been no other evidence presented to this Court by way of affidavit, interrogatory, or admissible evidence to show this Court that a conspiracy existed.

Plaintiffs in their Response to Defendants' Motion for Summary Judgment point out a number of facts with regard to the requirements for access to the FANS. There is no doubt from the evidence presented that Farmers made a decision that access to the FANS would only be permitted with equipment specifically approved by Farmers. This decision initially required that agents purchase IBM computers from Farmers. It was not until July of 1993 that agents were permitted to purchase computers from other sources.

Farmers' decision to control access was made for a number of legitimate, corporate reasons. Originally, as discussed in argument before this Court, no options other than the IBM equipment may have existed, because no other computer was available which was capable of performing the desired functions. Obviously, there are now a number of products on the open market in addition to the IBM System 36 which are capable of properly accessing the FANS. However, the Plaintiffs have presented no evidence regarding the alternative systems, or the price thereof. Plaintiffs have presented no evidence that Farmers did anything more than establish a business policy in an attempt to control access to its system in a uniform and safe manner. At best, the controverting facts offered by Plaintiffs in their response show simply that various computer options were available on the open market during the time period when Farmers required IBM equipment. It is possible that those available options may have cost less than the IBM system but no evidence supports this allegation. The facts that Farmers did not allow access except through approved computers, various agents chose not to buy computers from Farmers because of the cost or chose not to buy computers at all, or that agents in fact bought computers from Farmers do not show antitrust injury or damages, or coercion on the part of Farmers. All that these facts establish is that a number of agents were displeased with the options available to them. However, displeasure at the choices available to you when there is no requirement to act does not constitute an antitrust injury.

From a technical or personal opinion standpoint, Plaintiffs' experts do not agree with Farmers' method of limiting access . See Plaintiffs' Exhibit 114 (Walker affidavit) and Defense Exhibit 21 (Lubniewski affidavit). No illegal tying arrangement arises from the

undisputed fact that Farmers at certain periods of time only allowed access to its FANS only through computer equipment purchased from Farmers. An internal corporate policy which regulates access to corporate files and records, in this case policyholder information, does not fit the definition of an illegal tying arrangement subject to the antitrust laws.

Whether the equipment could have been obtained cheaper or even whether Farmers made money on the equipment that it sold the agents is not a "material fact issue" as to whether there was a product, whether the products were tied, whether agents were coerced into the purchase of equipment they did not want, or whether agents chose not to purchase equipment they did not want and therefore were damaged.

There has been no showing that the Plaintiffs were damaged, there has been no showing that electronic access is a product, and there has been no showing of market share in the tying or tied product to give rise to an antitrust violation. For these reasons, the undersigned recommends that the District Court **GRANT** Defendant Farmers Motion for Summary Judgment against Plaintiffs Vinson and Moon.

C. Summary judgment against United Farmers Agents Association

1. United Farmers Complaint.

On June 18, 1992, the United Farmers Agents Association, Inc. (UFAA) filed an antitrust claim against the Farmers Insurance agencies alleging antitrust "tying" claims in violation of section one of the Sherman Act and section three of the Clayton Act arising out of Farmers development and implementations of the Farmers Agency Network System (FANS). See UFAA Second Amended Original Complaint. Plaintiffs Vinson and Moon filed antitrust actions alleging the same activities on the same date. The only difference between the two complaints is that Plaintiffs Vinson and Moon sought damages for alleged past violations and UFAA sought only prospective injunctive and declaratory relief.

The UFAA claim seeks a prospective declaratory judgment that the alleged tie violates section one of the Sherman Act and section three of the Clayton Act. It seeks a determination and declaration that the Agency Appointment Agreement provided by Farmers does not confer upon Farmers the right to impose the alleged requirements that agents purchase computer equipment. See UFAA Second Amended Original Complaint, ¶¶ 43-50. In addition, UFAA seeks an injunction pursuant to section sixteen of the Clayton Act that Farmers cannot condition access to its files on the purchase of computer equipment. See UFAA Complaint, ¶¶ 51-54.

In its supplemental claims, UFAA seeks a prospective declaration of rights and injunctive relief as to the rights and obligations of Farmers and Farmers agents pursuant to the Farmers appointment agreement. (UFAA Complaint ¶¶ 33-42).

2. Defendants' Motion

The Defendants seek summary judgment on UFAA's claims for three reasons which will be up taken in turn in this discussion.

Defendants contend that UFAA has admitted that its allegations of Farmers' current policies are false. The Defendants allege that at the class certification hearing held on December 15, 1993 before United States District Judge James R. Nowlin, UFAA, through the statements of its counsel, admitted to the Court that the agents were not "at that time" subject to any allege tying arrangement:

> And my clients are prohibited from . . . or at least were in the past from accessing the data with the computer software and so forth other than from and only through Farmers.
>
> Now, you are going to hear some evidence today, that is not the case and I want to put that on the table right up front. Today that is not the case anymore. But from approximately 1980 to approximately the middle of 1993 that was the case, and that's the

reason this lawsuit was initiated.

Defense Exhibit 15 (Transcript of class certification hearing p. 5)

The Defendants allege that at this stage of the proceedings, with all the evidence presented and all discovery completed, Farmers' policies never constituted a tying arrangement and could not do so and that literally thousands of Farmers agents have obtained access to the FANS without purchasing computer equipment from Farmers. See Defense Exhibit 3 (Wong Affidavit, ¶ 9). Defendants allege that, in fact, in November of 1990, the attorney for UFAA sent a letter to the then UFAA secretary, now Plaintiff, Robert Moon, advising that it was the attorney's understanding that Farmers had not imposed a computer purchase requirement. See Defense Exhibit 16. Defendants allege that, from at least 1990 and to the admission in open court in 1993 that "there is no requirement to purchase from Farmers to gain access to FANS. Thus, Defendants assert that Plaintiff UFAA is not entitled to prospective injunctive relief on the undisputed facts now before the Court.

The Defendants contend that there is no genuine issue of material fact that Farmers is not conditioning access to FANS on the purchase of computer equipment. Section sixteen of the Clayton Act requires that there is a "threat" of impending antitrust injury to justify the extraordinary relief of imposing an injunction. The Defendants allege that there are no facts to show that there is any threat of impending antitrust injury. Specifically, the Defendants state that, with the introduction in May of 1994 of the Agency Information Managment System (AIMS), agents no longer can purchase or lease computer equipment directly from Farmers for use with the FANS. Agents may continue to obtain access to FANS when the necessary equipment is obtained from third parties. See Defense Exhibit 1 (Butler Affidavit, ¶ 8).

Defendants allege that Keener v. Sizzler Family Steak Houses, 597 F.2d 453 (5th Cir. 1979) and Roberts Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403 (9th Cir. 1984), establish that the defendant must have an economic interest in the sale of the tied product in order for an antitrust violation to take

place. Because the undisputed facts show that as of July of 1993 and more specifically since May, 1994, Farmers does not have an economic interest in the tied product, there can be no tying arrangement, and therefore no antitrust injury.

Defendants contend that UFAA cannot meet the stringent requirement of immediacy of impending antitrust injury which is necessary to invoke injunctive relief pursuant to section 16 of the Clayton Act. The remedy of an injunction is an extraordinary remedy and requires a showing of irreparable harm and therefore it requires that a plaintiff prove the existence, more than mere possibility, of some cognizable danger of recurrent violations. United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct 894, 897 (1953). Defendants allege that here UFAA cannot, and has not, shown that there is any significant threat of antitrust injury from any impending violations. Accordingly, Defendants assert that UFAA is not entitled to injunctive relief and summary judgment should be granted to Farmers and against UFAA.

3. Plaintiff's Response

Plaintiff UFAA contends in response that all a plaintiff need prove is an actual injury by purchasing a tied product. Eastman Kodak Co. v. Image Technical Services, Inc., - U.S. -, 112 S.Ct. 2072, 2079 (1992). Plaintiffs allege that the mere possibility that there is a danger of recurring violations is sufficient to survive a motion for summary judgment when permanent injunctive relief is sought.

4. Analysis

Plaintiff UFAA requests injunctive relief and also asserts pendent state law claims. The Court addresses each in turn:

a. Availability of injunctive relief.

This Court finds that Shanks v. City of Dallas, Texas, 752 F.2d 1092 (5th Cir. 1988), controls the availability of injunctive relief. The party seeking relief must show that there exist some

cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. W.T. Grant, 345 U.S. at 633, 73 S.Ct. at 897; Walls v. Mississippi Dep't of Public Welfare, 730 F.2d 306, 314 (5th Cir. 1984). Having previously recommended that the District Court find that there is no illegal tie based on the facts presented to it, the undersigned recommends that the District Court also find that there are no facts to support a request for injunctive relief.

Plaintiff UFAA has cited to a number of facts allegedly supporting its position that there will be continuing injury if an injunction is not issued by the Court. In reviewing all of the evidence cited by Plaintiff UFAA and all the other evidence presented in support of its response to the motions for summary judgment, this Court can find no evidence of any continuing violation or injury.

The Court is somewhat confused by Plaintiff UFAA's allegations at page eleven of their response brief that there is a "cognizable danger of continuing and recurrent antitrust violations and a very real risk of irreparable harm of forced terminations as retribution by Farmers against members." In reviewing the mountains of affidavits, deposition excerpts, answers to interrogatories and reading all the briefs in support, responses, and replies thereto and having conducted multiple hearings on various discovery requests, this Court has heard no evidence and has found no evidence in any of the exhibits that any agent has ever been threatened with termination if they did not buy a computer from Farmers to access the FANS, nor that any agent would be terminated by Farmers if they took part in this litigation.

Plaintiff UFAA alleges in its response to the Defendants' Motion that this Court is bound by United States District Judge James R. Nowlin's rulings made in his order denying Defendants' 12(b)(6) motion in which he found UFAA to be a suitable representative of the Farmers agents. However, the standard of review used for a 12(b)(6) motion in which a determination is made whether the pleadings state a claim upon which relief can be granted presents the Court considering the motion with a completely different question and burden of proof from the review given evidence submitted in

conjunction with a motion for summary judgment under Rule 56, in which rulings of law are made if no genuine issues of material fact are presented. Judge Nowlin's ruling made at the early stage was entirely appropriate. However, that ruling does not bind the Court when confronted with different requests for relief and different evidentiary standards at a later stage of the litigation.

The Court must now decide whether there are any controverting facts that will support the Plaintiff's allegations contained in their pleadings which are material issues sufficient to allow the case to proceed to trial. This Court finds there are no controverted material issues of fact to prevent summary judgment for the Defendants against Plaintiff UFAA.

The Defendants contend that there are no set of facts that could support a request for declaratory judgment because the practice about which Plaintiff complains in its Second Amended Complaint is no longer occurring. In addition, complete discovery has demonstrated that the challenged practice cannot reoccur because Farmers no longer sells computer equipment, the alleged tied product. Therefore, declaratory relief is unavailable. S.E.C. v. Medical Committee for Human Rights, 404 U.S. 403, 407, 92 S.Ct. 479-580 (1972).

b. Remand of state law causes of action.

The Defendants request that this Court dismiss the UFAA supplemental pendent state law claims. Supplemental jurisdiction is discretionary with the trial court. The UFAA claim requesting that this Court make determinations with regard to the application of the Agency Appointment Agreement between Farmers and all its agents, fourteen thousand in number (14,000) working in twenty-nine states, presents an issue of state contract law arising in multiple state fora. See UFAA Second Amended Complaint. The complaints made by UFAA with regard to the Agency Appointment Agreement have nothing to do with any of the other alleged illegal activities by Farmers. Many of the complaints deal specifically with interpretation of the Agency Appointment Agreement with regard to termination of an agent, specifically whether Farmers can terminate an agent because

the agent has fallen below a certain profit level. This Court recommends that the United States District Court decline to exercise its pendent (supplemental) jurisdiction over claims arising under state law and dismiss them without prejudice.

D. Class certification.

1. Defendants' motion to dismiss class under 23(b)(2) and deny class under 23(b)(3).

Defendants have moved to dismiss as a class action pursuant to Fed. R. Civ. P. 23(b)(2) and to deny certification pursuant to Fed. R. Civ. P. 23(b)(3). There is also pending a separate Plaintiffs' Motion to Certify a Class under Fed. R. Civ. P. 23(b)(3) and Defendants' response to that motion.

The Defendants allege in their motion to dismiss that the Plaintiffs have now affirmatively demonstrated that they have no case, whether individually or on behalf of a damage class. Defendants assert that: Plaintiffs have at all times been aware that Farmers did not require the purchase of computer equipment; and second, Plaintiffs have affirmatively demonstrated that Farmers made a conscious business decision not to mandate the purchase of computer equipment.

On January 4, 1994 United States District Judge James R. Nowlin entered an order on class certification. Judge Nowlin denied the Plaintiffs' motion for certification of a damage class pursuant to Fed. R. Civ. P. 23(b)(3). On the Court's own motion, Judge Nowlin ordered that the case continue during the remaining discovery period as a class action pursuant to Fed. R. Civ. P. 23(b)(2). See Defense Exhibit 25 (Judge Nowlin's order pp. 7-8, also quoted in this report and recommendation at p. 11-12). The certification of the class under 23(b)(2) grounds was to allow discovery to be conducted to ascertain the class status, possible claims, and the potential for any damage classes under 23(b)(3). As this Court is aware, under Fed. R. Civ. P. 23(c)(1) "an order under this subdivision may be conditional and it may be altered or amended before the decision on the merits." See

Salazar v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1350 (5th Cir. 1985), cert. denied, 475 U.S. 1035, 106 S.Ct. 1245 (1986). It is incumbent upon any court reviewing an action certified as a class, or requested to be certified as a class, to review the evidentiary status of the class request as the proceedings develop. Id.

Farmers contends that, if the Court reviews the over one hundred affidavits from Farmers agents, the issue is simply that these agents made individual decisions to purchase or not to purchase computer equipment and that Farmers did not compel anyone to purchase anything. Farmers contends that these affidavits are uncontroverted. See Defense Exhibit 26. Farmers also contends that the Plaintiffs have abandoned any theory of recovery under 23(b)(3) for damage since they have conducted no damage discovery. Farmers asserts that not only did each Farmers agent make an individual decision whether or not to purchase computer equipment, but also thousands of these agents found alternative means to electronically access the FANS without purchasing any computer equipment at all. See Defense Exhibit 3 (Wong affidavit ¶¶ 8-9); Defense Exhibit 4 (Larsen affidavit ¶¶ 25, 28). These agents have had access to the policyholder information through what has been called in this lawsuit "manual access" through telephones, facsimile machines, mail service, and the use of manuals contained in each agent's office. Farmers contends that Plaintiffs themselves concede these uncontroverted facts, citing the Court to Defense Exhibit 27, which is the Plaintiffs' brief in support of class certification at p. 4, ¶¶ 3-4. Farmers contends that during discovery Plaintiffs produced a letter from UFAA lawyer John S. Heim addressed to Plaintiff Dale Moon in which the counsel stated that "no such requirement is stated in existing agency appointment agreements and "as I understand it no such requirement (to purchase computers) has yet been imposed." This letter was published in the Voice, the UFAA newsletter, and is admissible pursuant to Fed. R. Evid. 801(d)(1).

Farmers additionally contends that Plaintiffs' expert, Dr. Walker, concludes "electronic access is not required in order to operate an agency profitably and generate earnings commensurate to the agent's alternatives." See Plaintiffs' Exhibit 114 (Walker affidavit ¶ 14). Farmers asserts that both the letter and affidavits and other

evidence adduced during the proceedings show that Farmers have never imposed a tie between "access" or "electronic access" to its policyholder information and the purchase of computer equipment.

Dr. Walker continues in other testimony to state that "in fact Farmers typically discourages agents from purchasing a computer until the agents have a large number of policies in force." See Plaintiffs' Exhibit 114 (Walker affidavit ¶ 16). Dr. Walker in his deposition states that in his opinion, supporting the admissions he made in his affidavits, "agents are not required to purchase access." See Defense Exhibit 9 (Walker deposition p. 78). Defendants state that there is additional evidence of the no purchase requirement presented in Defense Exhibit 28, an article from the Voice, containing a review of the Farmers dial-in access to the computer system. The article states that although expensive, it is an individual agent's decision about whether or not a computer should be purchased. Farmers contends that these evidentiary points raise the question about whether individual issues predominate over class issues and therefore speak against any class certification.

Plaintiffs' response to this particular motion cites this Court to the order issued by Judge Nowlin on January 4, 1994 and to the initial evidence produced to Judge Nowlin at the time of the original class motion hearing. The documents submitted by both Plaintiffs and Defendants for the original class motion hearing before Judge Nowlin have again been submitted as exhibits to the motions for summary judgment and for dismissal and have been considered by the undersigned in this recommendation.

Farmers contends additionally that Plaintiffs have affirmatively demonstrated that Farmers made a conscious business decision to not mandate the purchase of computer equipment. Farmers contends that not only have the Plaintiffs not established a tie violation, they have in actuality established that the Defendants made a conscious decision to not impose the alleged tying arrangement about which Plaintiffs complain. Farmers asserts that this evidence was adduced by Plaintiffs in connection with their discovery when an internal memorandum dated June 29, 1990 was provided to the Plaintiffs. This memorandum was from Farmers employee Jack

Lewis to other Farmers employees Jim Roberts and Dennis Shanley. This memorandum began an exchange of memoranda and proposals all produced during discovery, see Defense Exhibits 30 and 31, which discuss in detail, as internal Farmers memoranda, both the legal and business options of mandating electronic access to the policyholder information. In Defense Exhibit 31 under the topic of "Internal Issue No. 1," it is concluded that "the companies would be in breach of its agreement with existing agents if it required its agents to lease, purchase, or have access to computer equipment." The memo concludes that the companies (Farmers) will "encourage but NOT REQUIRE existing agents to purchase, lease, or have access to a computer and that the companies have as a matter of policy decided to maintain a dual system." (emphasis in original memorandum). The memo continues further with "Internal Issue Number 3" where the legal department advises and concludes that it would not be possible to require its new agents to lease or purchase an agency computer system and related service from the companies without creating a franchise.

In the deposition taken of Farmers employee J.R. Roberts (Defense Exhibit 32), Mr. Roberts testified that there was discussion about mandating agents to have computer access to the policyholder information but this idea was rejected for both business and legal reasons with respect to both new agents and existing agents.

Plaintiffs make no specific response to Defense Exhibit 32 and to the discussions regarding Farmers' internal memoranda. Plaintiffs have offered no evidence other than to request the Court to not "disturb" Judge Nowlin's original class findings. The undersigned finds that argument both unpersuasive and in direct contravention of Fed. R. Civ. P. 23(b)(1), as quoted above.

2. Plaintiffs' Motion to Certify Class under 23(b)(3).

The Plaintiffs have moved to certify a class with respect to damages pursuant to Fed. R. Civ. P. 23(b)(3)(Doc. #203 filed November 14, 1994). This motion requests that the Court certify a class under Rule 23(b)(3) pursuant to the original order of Judge

Nowlin on January 4, 1994. Plaintiffs argue that this motion was filed to comply with the scheduling order deadline that all documents be filed by November 14, 1994. By their own request and contained in the motion itself, Plaintiffs assert that the January 4, 1994 order established the "procedural steps to be followed by the parties in this matter, which do not include any consideration of a damage class until the issue of liability has been determined." The only evidence in support of the motion is a copy of Judge Nowlin's January 4, 1994 order.

Defendants filed a response to Plaintiffs' motion alleging that Plaintiffs have failed to sustain their burden of proving the essential elements required for certification of a damage class pursuant to Fed. R. Civ. P. 23(b)(3). In reviewing the file this Court finds that a motion to bifurcate filed by the Plaintiffs on June 24, 1994 was denied on September 16, 1994. Additionally, Plaintiffs' request that an evidentiary hearing be held on the issue of liability was denied by the undersigned on October 3, 1994, and the appeal of that order was affirmed by Judge Nowlin on October 21, 1994. A review of the Plaintiffs' two page motion to certify, the response, and the prior discussion of the evidentiary matters brought forward in other motions for summary judgment shows there is no evidence establishing common proof of elements of facts of damage, no evidence that the tying arrangement existed, and that therefore Plaintiffs have not met their burden to establish elements for a damage class action pursuant to the provisions of Rule 23(b)(3). See Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1321 (5th Cir. 1976). Therefore, the Court recommends that the Defendants' Motion to Dismiss as a Class Action under Fed. R. Civ. P. 23(b)(2) be **GRANTED** and the Plaintiffs' Motion for Certification as a Class under Rule 23(b)(3) be **DENIED**.

E. In the alternative, partial summary judgment against Vinson and Moon on statute of limitations.

1. Defendants' Motion

This case was filed on June 18, 1992. Defendants request summary judgment as to members of the class who entered into a

computer installment sales and security agreement and an agency network service agreement with Farmers prior to June 18, 1988 (some but not all of the members of the Vinson class). Because Vinson entered into a computer sales agreement prior to June 18, 1988, he is included in the sub-class subject to this summary judgment motion. See Defense Exhibit 10 (Vinson deposition).

Defendants similarly request summary judgment as to members of the class who decided prior to June 18, 1988 to not enter into a computer installment sales and security agreement with Farmers (some but not all of the members of the Moon class). There is no evidence in the motion whether Plaintiff Moon is a member of this sub-class.

Defendants assert that the cause of action accrued in the present case for each class member when that class member either purchased the computer equipment from Farmers or decided not to purchase the equipment. Defendants point out that the Clayton Act provides a four year statute of limitations for suits alleging antitrust violations. 15 U.S.C. § 15b. The statute of limitations therefore bars recovery by any class member whose claims arose more than four years before Plaintiffs filed suit.

2. Plaintiff's Response.

Plaintiffs assert that the causes of action arising prior to June 18, 1988 are not barred both because the Defendants have committed continuing violations of law and because the Plaintiffs' cause of action did not accrue until their damages could be ascertained.

3. Analysis

An antitrust cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures a plaintiff's business. Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1051 (5th Cir. 1982), cert.

denied, 459 U.S. 1105, 103 S.Ct. 729 (1983).[3] It is clear that if some members of the class made a decision with respect to purchasing the computer equipment prior to June 18, 1988, their claims are barred unless they can show that they fall within an exception to the bar of the statute of limitations.

There are two bases for permitting suit more than four years after a cause of action accrues: continuing violation and revival.[4] Id., (citing Zenith Radio Corp. v. Hazeltine Research, Inc. 401 U.S. 321, 338-40, 91 S.Ct. 795, 806-07 (1971)); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 501 n. 15, 88 S.Ct. 2224, 2236 n. 15 (1968). First, "the 'continuing violation' or 'continuing conspiracy' exception to the four year statute of limitations permits a new cause of action to accrue whenever the defendant commits an additional overt act in furtherance of the antitrust conspiracy or commits an act that by its very nature is a continuing antitrust violation." Kaiser, 677 F.2d at 1051. Second, the revival exception "involves situations where the defendant's antitrust act is 'revived' outside the limitations period . . . because when the act originally occurred, the plaintiff's damages were speculative or unprovable." Id.

a. Continuing Violation.

Plaintiffs assert that Defendants' "policy of misleading agents with respect to access to FANS" was an additional overt act amounting to a continuing violation sufficient to revive the barred causes of action. However, continuing conduct within the limitations period which merely furthers the initial antitrust violation does not

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[3] In Kaiser Aluminum the Court found that a counterclaim alleging an illegal tying arrangement was barred by the statute of limitations. The contract made the basis of the counterclaim was signed more than four years prior to the claim being alleged. The Court found that, because damages, although not definite in amount, were not speculative or unprovable at the time the contract was signed, summary judgment was appropriate.

[4] Revival occurs when the damages are speculative or unprovable at the time of the antitrust violation. Kaiser, 677 F.2d at 1052.

prevent the running of the statute of limitations. See Al George, Inc. v. Envirotech Corp., 939 F.2d 1271, 1275 (5th Cir. 1991)(antitrust action based on sham litigation accrues when suit filed, continued prosecution of suit does not toll running of limitations or create new cause of action). Even assuming that Farmers continued to mislead its agents after June 18, 1998, this continuing conduct is not an injurious act separate from the prior alleged misconduct. An antitrust suit "must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." TCA Building Co. v. Northwestern Resources, 861 F. Supp. 1366, 1377-78 (S.D. Tex. 1994), citing Kaiser, 677 F.2d at 1051 and Poster Exchange Inc. v. National Screen Service Corp., 517 F.2d 117, 128 (5th Cir. 1978).

Plaintiffs have failed to show a continuing violation. As such, the statute of limitations cannot be tolled on that basis.

b. Speculative or unprovable damages.

Plaintiffs assert that, because their damages were speculative at the time the contract was signed, the statute of limitations does not bar claims arising prior to June 18, 1988. Plaintiffs base this argument on provisions in the agency network service agreement and the computer installment sales and security agreement.

The agency network service agreement provides that an agent was only permitted to utilize FANS with "equipment authorized by Farmers including but not limited to peripherals, memory enhancements and additional disk capacity." Plaintiffs argue that this provision establishes that, because the computer could be upgraded, their damages were speculative. This argument clearly fails. Plaintiffs post-suit speculation regarding prospective upgrades in their computer systems does not render their damages speculative or unascertainable at the time the service agreement was signed.

Plaintiffs additionally argue that a provision in the Sale and Security Agreement prohibiting the buyer from making changes in the computer equipment unless authorized by Farmers also rendered their damages speculative at the time they signed the contract. However,

the fact that the computers could not have additional equipment added to them without Farmers' consent does not establish that the class members' damages could not have been calculated at the time they signed the Sale and Security Agreement.

The class members' damages were reasonably ascertainable at the time the decision was made whether or not to purchase the computer system from Farmers. Any wrongful conduct by Farmers in misleading the class members does not revive the suit for purposes of the statute of limitations. Therefore, the statute of limitations bars suit by any class members who entered into a Computer Installment Sales and Security Agreement with Farmers prior to June 18, 1988, or who decided prior to June 18, 1988 to not enter into a Computer Installment Sales and Security Agreement. Summary judgment in favor of Farmers should therefore be granted with respect to all class members whose claims accrued prior to June 18, 1988.

IV.
RECOMMENDATION

The Magistrate Court hereby recommends to the District Court as follows:

(1) **GRANT** Defendants' Motion for Summary Judgment against Plaintiffs Vinson and Moon and **DISMISS WITH PREJUDICE** the claims asserted by Plaintiff Vinson and Moon against Defendants;

(2) **GRANT** Defendants' Motion for Summary Judgment Against Plaintiff UFAA and **DISMISS WITH PREJUDICE** the claims asserted by UFAA. The Court also recommends that the District Court **DISMISS WITHOUT PREJUDICE** all state law causes of action.

(3) **GRANT** Defendants' Motion to Dismiss as a Class Action; and

(4) **DENY** Plaintiffs' Motion to Certify as a Class Action.

In the alternative and only if the above recommendation is not adopted with respect to the summary judgments in favor of Defendants, the Magistrate Court recommends that the District Court

(5) **GRANT** Defendants' Motion for Partial Summary Judgment Against Vinson and Moon based on the statute of limitations and **DISMISS WITH PREJUDICE** all claims of any class members arising prior to June 18, 1988.

V.
WARNING

Any party may file objections to this recommendation to show cause why this should not be dismissed. Failure to file written objections to the findings and recommendations contained in this report within ten (10) days from the date of its receipt shall bar an aggrieved party from receiving a de novo review by the district court of the findings and recommendations in this report, see 28 U.S.C. §636(b)(1)(C), and shall bar an aggrieved party from attacking the findings and recommendations contained in this report on appeal, see Nettles v. Wainwright, 677 F.2d 404, 408-410 (5th Cir. 1982) (Unit B en banc); see also, Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435, 445 (1985) (rehearing denied) (bar of attack on appeal held constitutional and not in violation of Federal Magistrates Act.)

The clerk is directed to mail a copy of this Report and Recommendation to all parties by return mail, receipt requested.

SIGNED this 6th day of April, 1995.

Stephen H. Capelle
United States Magistrate Judge

No. 96-981

Supreme Court, U.S.
FILED
JAN 2 1997

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

UNITED FARMERS AGENTS ASSOCIATION, INC., et al.,
Petitioners,

vs.

FARMERS INSURANCE EXCHANGE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Properly framed, the question presented by the Petition is whether it was reversible error for the Court of Appeals to find that Respondents lacked market power in the market for insurance sales, where Petitioners admitted that Respondents lacked such power, and where Petitioners offered no evidence in support of a narrower relevant market.

PARTIES TO THE PROCEEDING

The Petitioners, appellants in the Court of Appeals, are United Farmers Agents Association, Inc., a California corporation, Thomas J. Vinson, individually and on behalf of a purported class, and Robert D. Moon, individually and on behalf of a purported class.

The Respondents, appellees in the Court of Appeals, are Farmers Insurance Exchange, a California reciprocal, or inter-insurance exchange, Fire Insurance Exchange, a California reciprocal or inter-insurance exchange, and Truck Insurance Exchange, a California reciprocal or inter-insurance exchange. As to the above Respondents, there are no parent or subsidiary companies.

Additional Respondents, appellees in the Court of Appeals, include Mid-Century Insurance Company, a California stock company, owned by Respondents Farmers Insurance Exchange, Fire Insurance Exchange, and Truck Insurance Exchange, and Farmers New World Life Insurance Company, a wholly-owned subsidiary of Farmers Group, Inc., a California corporation, a wholly-owned subsidiary of BATUS, a United Kingdom PLC.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

A. There Is No Conflict With Any Decision Of This Court. 5

B. There Is No Conflict With Any Decision Of Another Circuit. 8

C. This Case Is In Any Event An Inappropriate Vehicle For Review. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases **Page(s)**

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 12

DeJesus v. Sears, Roebuck & Co., Inc.,
87 F.3d 65 (2nd Cir.), *cert. denied*, U.S. LEXIS
7180 (U.S. 1996) 10,11

Digital Equip. Corp. v. Uniq Digital Technologies, Inc.,
73 F.3d 756 (7th Cir. 1996) 6, 10

Eastman Kodak Co. v. Image Technical Servs., Inc.,
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940 F. Supp. 944 (E.D. La. 1996) 13, 14

Statutes

Sherman Antitrust Act of 1890, Section 2 10
S. Ct. R. 10 ..... 8, 13

No. 96-981

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

UNITED FARMERS AGENTS ASSOCIATION, INC., et al.,
Petitioners,

v.

FARMERS INSURANCE EXCHANGE, et al.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents ("Farmers") are five insurance companies selling various lines of insurance, including life, homeowners, automobile, and commercial liability. Farmers has approximately 14,000 independent contractor agents operating in twenty-nine states. Pursuant to contracts with the agents, Farmers is obligated to provide, without charge, policyholder information. At all times, Farmers has provided policyholder information to its agents by supplying company manuals and forms.

In 1981, Farmers created a dual system of policyholder information retrieval. Agents were encouraged, but not required, to access computerized records through a dumb terminal. This system has been generally referred to as the Farmers Agency Network System ("FANS"). Beginning in 1985, as computer systems became more technologically advanced, agents accessing FANS could also make changes in the database itself. Although policyholder information remained available in manual form, agents opting for computerized retrieval had to do so by using a specially - configured computer purchased or leased from Farmers.[1/] Despite the growth of services available via FANS, agents

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1/ As technology continued to advance, Farmers increased the number of options available to subscribing agents. Beginning in 1993, agents wishing to participate in computerized retrieval were able to do so through the purchase of compatible equipment from third parties.

have always had the ability to access the same information by telephone, fax, or mail without the necessity of computer linkage.[2/] Agents were encouraged by Farmers not to purchase computer equipment until the size of their business had grown sufficiently to make it economically efficient. Agents were encouraged to "cluster" and to share computer equipment by various means either with other agents or with district managers. As an incentive, Farmers offered a small per transaction payment to each agent who would electronically access FANS, whether the agent owned a computer or not.

In the fifteen years that the FANS program has been operating, only half of Farmers' 14,000 agents have leased or purchased systems. However, over ninety percent of the agents have achieved electronic access, either through purchasing or leasing a FANS computer system, or by some form of sharing.

Electronic access to Farmers' policyholder information is made available only to Farmers' agents and employees. It is not made available to third parties, and has never been sold or leased. Agents do not pay for access to policyholder information. Farmers is in the business of selling insurance to

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2/ FANS includes "off-line" services, including word processing, desk top publishing, and other marketing features. Thousands of agents have their own "off-line" computer systems, totally independent of FANS.

policyholders through its agents. It does not sell policyholder information, and does not sell computers or computer services except in support of its provision of services to insurance customers.

Petitioners agree that the insurance sales market is highly competitive, and that Farmers lacks market power in this market. Rather, they contend that Farmers' lack of market power in the market for insurance sales is "irrelevant." Petitioners contend that the Court of Appeals erred in failing to define a "market" consisting of "electronic access" to Farmers' policyholder information. In failing to find a market in which Farmers has a 100 percent share, Petitioners contend that the Court of Appeals failed or refused to follow *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) ("*Kodak*").

This Brief In Opposition will demonstrate that Petitioners are wrong. The Court of Appeals followed *Kodak*, and applied it correctly. The Court of Appeals correctly found that Petitioners failed to present any evidence that there was a "market" for electronic access, or that Farmers could have possessed or exercised market power. Petitioners thereby failed the threshold test of presenting evidence of "appreciable economic power" in the tying product market. *Kodak*, 504 U.S. at 462.

REASONS FOR DENYING THE PETITION

A. There Is No Conflict With Any Decision Of This Court.

The Petition provides no basis for review by this Court. Petitioner does not suggest that there is a conflict among the Courts of Appeals concerning the issues resolved in this case. As will be discussed herein, the Courts of Appeals for the Second, Fifth, and Seventh Circuits have come to the same conclusion on substantially similar issues. Nor does the Petition present any important question of federal law for this Court to review, or call for an exercise of this Court's supervisory power over the proceedings of the lower courts. Since at least *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958), through *Kodak*, the Courts of Appeals and the District Courts have been relatively uniform in recognizing and applying the elements of a tying violation. Since at least this Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984) ("*Jefferson Parish*"), the courts have recognized that appreciable economic power in a properly defined tying market is an essential element.[3/]

Contrary to Petitioners' assertions, the decision of the Court of Appeals does not conflict with any decision of this Court. Clearly, it does not represent a repudiation or a refusal

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3/ In *Jefferson Parish*, the Court defined market power as "the ability of a single seller to raise price or restrict output." 466 U.S. at 14.

to apply the principles of *Kodak*. In performing its *de novo* review of the grant of summary judgment by the District Court, the Court of Appeals defined the relevant market consistent with decisions of this Court, including *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) ("*du Pont*"); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Jefferson Parish*, 466 U.S. 2; and *Kodak*, 504 U.S. 451. The Court of Appeals found that it was undisputed that Farmers lacked market power in the relevant market of insurance sales. The Court applied the cross-elasticity of demand for substitutes test as a determinant for the presence or absence of market power. From *du Pont* to *Kodak*, there is nothing unique or startling about this analysis, nor its citations of authority, including Professors Areeda, Turner, Baumol, and Blinder.[4/] It is a correct application of controlling law in defining markets.

Petitioners seem to argue that *Kodak* represents a repudiation of the principles of *Jefferson Parish*, and, by implication, of *du Pont*, and of a legion of antitrust commentators.[5/] This is misplaced. *See, e.g., Digital Equip.*

4/ *See, e.g.*, Court of Appeals decision at Footnote 3, reprinted in Appendix at A-4.

5/ Petitioners do not cite a single post-*Kodak* case that supports the proposition that *Kodak* has in any way modified the law relating to the market definition process.

Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756, 763 (7th Cir. 1996). The cases are in harmony, and not in conflict.

Petitioners' argument that *Kodak* has rewritten the law of tying and market definition is simply wrong. *Kodak* does not dispense with analyzing markets to determine the availability or lack thereof of substitutes which would, assuming a price increase, cause consumers to substitute away from the increase. Rather, it recognizes that summary judgment at an early stage in a complex antitrust case should not be granted where the plaintiff is able to articulate market imperfections that would demonstrate that substitutes are not, in fact, available, as a constraining influence on the ability of a defendant to price above competitive levels. This is particularly so where, with scant discovery, there was evidence in *Kodak* of pricing above competitive levels, and a showing of the ability to price discriminate against buyers who, because of previously incurred sunk costs, were unable or unlikely to be able to substitute away from the increase. Thus, rather than dispense with market analysis of substitutes, *Kodak* recognized that market realities would be preferred over underdeveloped economic theory.[6/]

In *Kodak*, the Court discussed market imperfections, and the inability to substitute away from price increases

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6/ Here, the market reality is that after two years of discovery, Petitioners could not present any market imperfection evidence to warrant a narrowing of the relevant market to a single brand.

because of high information or switching costs. On Farmers' facts, the Fifth Circuit applied the *Kodak* analysis and held that, even assuming a "market" for "electronic access," Petitioners had tendered no evidence of information or switching costs, and no evidence of price discrimination imposed upon any pre-1981 agents. As to agents who joined Farmers after 1981, the Court properly held that there were insignificant information costs. Manual access and "clustering" are good substitutes, so there were insignificant switching costs. Accordingly, the Court of Appeals decision is essentially factually driven, and is certainly not the result of a failure or refusal to apply the appropriate market definitional tests of this Court.[2/]

B. There Is No Conflict With Any Decision Of Another Circuit.

Petitioners do not argue that the Court of Appeals decision is in conflict with the decision of any other Circuit, and it is not. Accordingly, the within decision is inappropriate for review pursuant to Supreme Court Rule 10.

2/ As noted by the Court of Appeals, Petitioners' counsel could offer no justification for choosing "electronic access" as a "relevant market" other than that he was trying to define the market as narrowly as possible, in order to make it look as if Farmers had market power. Appendix at A-5.

All of the Courts of Appeals that have addressed similar issues have spoken with one voice in refusing to conclude that *Kodak* overruled *Jefferson Parish*, *du Pont*, and other leading precedents of this Court applying traditional market analyses to antitrust tying claims.

In *Lee v. Life Ins. Co. of North America*, 23 F.3d 14 (1st Cir.), *cert. denied*, 115 S. Ct. 427 (1994), three university students appealed a District Court dismissal of their federal tying claim and argued that, pursuant to *Kodak*, it was error for the District Court to find that their "information costs" allegations were insufficient. The Court rejected appellants' argument and held that they had exaggerated the reach of *Kodak*. The Court of Appeals held that information needed to evaluate matriculation at the University of Rhode Island ("URI"), which was conditioned on the "purchase" of health clinic services, was not shown to be beyond the reach of students wishing to attend the university. Citing Areeda and Hovenkamp, the Court noted that *Kodak* should be viewed in context, and applied only to situations where information is hard to obtain. Here, there is no evidence that there were any "information" costs of any significance.[8/]

8/ The District Court ruled further that the students had failed to state an actionable claim that they were "locked in," as they failed to plead actual costs that would be associated with switching from URI after their first semester. *Lee*, 23 F.3d at 19. Here, Plaintiffs also failed to allege any actual switching costs.

In *Digital Equip.*, the Court of Appeals for the Seventh Circuit affirmed the dismissal of an antitrust counterclaim, in which Uniq alleged the tie of the plaintiff's computer to an installed operating system.[2/] 73 F.3d 756. Judge Easterbrook held that Uniq's reliance on a single seller market was misplaced. Under Uniq's interpretation, *Kodak* would have overruled *Jefferson Parish*. The Court held that *Kodak* did not. *Digital Equip.*, 73 F.3d at 763. Uniq had not supplied any evidence that Digital was able to raise prices or exploit any customer by deciding to include an operating system with the computers. This is because Digital would not be able to exploit any customer "locked in" to its equipment. Existing customers would be unaffected, and potential customers would shop for substitutes.

In *DeJesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65 (2nd Cir.), *cert. denied*, U.S. LEXIS 7180 (U.S. 1996), the Court of Appeals for the Second Circuit affirmed the dismissal of a complaint without leave to amend, holding that access to an insurance company's database cannot, as a matter of law, be deemed a tying or tied "product." The Court held that the database is not generally available to persons willing to pay for it. Rather, it is a body of information that is made available to the insurance company's agents in connection with their

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2/ Uniq included a claim for relief for violation of Section 2 of the Sherman Act. This same claim was asserted in *Kodak*. There is no Section 2 claim in the within litigation.

employment. In affirming the District Court's dismissal of the complaint without leave to amend, the Court cited *United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch.*, 892 F. Supp. 890, 902 (W.D. Tex. 1995), as follows:

> [E]lectronic access to the information contained in [a database maintained by an insurance company for its agents] is not a "product" capable of tying IBM computers
>
> . . . .

DeJesus, 87 F.3d at 71. The Court of Appeals for the Second Circuit then added: "Again, this tying claim fails at the threshold." *Id.*

Here, the Court of Appeals for the Fifth Circuit recognized that rather than constituting a "separate product," electronic access to policy information was merely a component of Farmers' insurance product, and had never been made available to anyone other than a Farmers' agent.[10/] As such, "This suit is essentially an intracompany dispute over how to run a computer system, not a valid claim under the antitrust laws." Appendix at A-5.

10/ This is consistent with the Court's holding in *Kodak* that for services and parts to be considered two distinct products, there must be sufficient consumer demand so that it would be efficient for a firm to offer them separately. 504 U.S. at 462.

It is not surprising that Petitioners, after two years of discovery pursuant to a scheduling order, have offered no evidence of high information or switching costs. There has always been intense competition in the market for insurance agents, which forced Farmers to pay competitive wages and precluded it from imposing above-market prices for services to agents. Manual access was a good substitute for electronic access, so this factor alone would seriously limit Farmers' ability to charge more than a market price for electronic access to the same information.[11/] Appendix at A-8.

There are no conflicts of decisions among the various circuits. Accordingly, review is inappropriate.

C. This Case Is In Any Event An Inappropriate Vehicle For Review.

A fair reading of the Court of Appeals decision compels the conclusion that it properly applied the principles of *Jefferson Parish* and *Kodak*. In fact, the Court of Appeals for the Fifth Circuit pointedly noted the distinction between *Kodak* and the present case, stating:

11/ Petitioners' theory has always been implausible as against Farmers' economic interest. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 243 (1993); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 595 (1986).

> In sharp contrast to *Kodak*, in which the plaintiffs supported their claims of market power with evidence that Kodak charged above-market prices and engaged in price discrimination, the plaintiffs here simply allege that Farmers charged prices above the market price for computers without offering any evidence of what the market price for reliable computers was or alleging that the bundle of products, taken together, was sold at an above-market price.

Appendix at A-7.

Petitioners' quarrel seems to be with the finding by the Court that the Plaintiffs failed to raise a question of material fact as to whether Farmers could have market power within a "market" for electronic access to Farmers' policyholder information, even assuming that there could be such a "market." Thus, Petitioners' quarrel is not with the Fifth Circuit's application of *Kodak*, but with the alleged erroneous factual findings or the alleged misapplication of a properly stated rule of law. As set forth in Supreme Court Rule 10, a petition for writ of *certiorari* is rarely granted in either eventuality.

That the Court of Appeals for the Fifth Circuit evenhandedly applied the rules of *Kodak*, and rendered its decision in a factually-based manner, is articulated in *Wilson v. Mobil Oil Corp.*, 940 F. Supp. 944 (E.D. La. 1996). There,

the Court denied a motion to dismiss and held that because of allegations of *Kodak*-type switching and information costs, the plaintiff should be allowed to prove that the relevant product market was the defendant's franchise system. In so holding, the District Judge stated that:

> The Court is also mindful of the Fifth Circuit's recent decision in *United Farmers Agents Association, Inc. v. Farmers Insurance Exchange*, 89 F.3d 233 (5th Cir. 1996). There, the Court affirmed a summary judgment dismissing tying claims by insurance agents who asserted that five insurance companies had tied access to computerized policyholder information to the purchase of specially configured IBM computers . . . [I]t expressly addressed the issues of whether there was evidence of high information or switching costs to justify invocation of *Kodak*. Finding no such evidence, the Court affirmed summary judgment for the insurers.

Wilson, 940 F. Supp. at 952.

Because Petitioners' primary complaint is that the Court of Appeals made erroneous factual findings or misapplied a properly stated rule of law, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Dated: January 2, 1996

Respectfully submitted,

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